IN THE MATTER OF THE CONTESTED ELECTION OF ARTHUR E. MALLORY FOR THE OFFICE OF DISTRICT ATTORNEY OF CHURCHILL COUNTY.

JOHN O'CONNOR, APPELLANT, *v.*
ARTHUR E. MALLORY, RESPONDENT.

No. 57312

August 9, 2012 282 P.3d 739

Appeal from a district court order denying a petition to set aside the election of the Churchill County District Attorney. Tenth Judicial District Court, Churchill County; Leon Aberasturi, Judge.

Registered voter in county petitioned to set aside the reelection of county district attorney. The district court denied the petition. Voter appealed. The supreme court, SAITTA, J., held that office of county district attorney was not a ''state office'' for purposes of the Nevada Constitution's term-limit provision for state offices.

Affirmed.

Jones Vargas and *Bradley S. Schrager*, Las Vegas, for Appellant.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Thomas L. Stockard*, Chief Deputy District Attorney, and *Craig B. Mingay*, Deputy District Attorney, Churchill County, for Respondent.

Neil A. Rombardo, District Attorney, Carson City, for Amici Curiae Nevada Association of Counties and Nevada District Attorneys Association.

Jim C. Shirley, District Attorney, Pershing County, for Amici Curiae Pershing County; and Celeste Hamilton, Pershing County Assessor.

1. APPEAL AND ERROR.
   The supreme court reviews questions of constitutional interpretation de novo.
2. CONSTITUTIONAL LAW.
   When interpreting a constitutional provision, the court first looks to the language itself and will give effect to its plain meaning, unless the provision is ambiguous.
3. CONSTITUTIONAL LAW.
   A constitutional provision is considered ambiguous when it is capable of at least two reasonable yet inconsistent interpretations.
4. CONSTITUTIONAL LAW.
   When courts engage in constitutional interpretation, the document should be reviewed as a whole in order to ascertain the meaning of any particular provision.

5. JUDGES.
   The Nevada Constitution's term-limit provision for state offices and local governing bodies does not apply to judicial officers. Const. art. 15, § 3(2).
6. DISTRICT AND PROSECUTING ATTORNEYS.
   Office of county district attorney is not a ''state office'' for purposes of the Nevada Constitution's term-limit provision for state offices; rather, another provision of the Constitution clearly declares that district attorneys are county officers. Const. art. 4, § 32, art. 15, § 3(2).
7. STATES.
   A determination of whether an elected office is considered a state office, for purposes of the Nevada Constitution's term-limit provision for state offices, turns on whether the office is included in the list of state officers set forth by statute or is subject to election by the electors of the entire state or of a subdivision larger than a county. Const. art. 15, § 3(2); NRS 293.109.

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

In this appeal, we address the narrow question of whether the office of district attorney is a state office for the purpose of determining whether district attorneys are subject to term limits under the ''state office'' portion of Article 15, Section 3(2) of the Nevada Constitution. Reviewing the Constitution as a whole, our resolution of this inquiry is controlled by Article 4, Section 32 of the Constitution, which plainly declares district attorneys to be ''county officers.'' Because Article 4, Section 32 identifies district attorneys as county officers, it follows that the office of district attorney cannot be considered a ''state office'' for term-limits purposes, and thus, district attorneys are not subject to term limits under the ''state office'' portion of Article 15, Section 3(2). Accordingly, we affirm the district court's order denying appellant's petition to set aside respondent's election to a fourth consecutive term as the Churchill County District Attorney.

FACTS AND PROCEDURAL HISTORY

Respondent Arthur E. Mallory is Churchill County's district attorney. Mallory was first elected to this office in 1998 and was elected to a fourth consecutive four-year term of office in the 2010 general election. Only voters in Churchill County vote for the office of Churchill County District Attorney. Appellant John O'Connor is an elector and registered voter within Churchill County.

Following Mallory's most recent reelection, O'Connor timely filed in district court a proper person petition seeking to set aside

Mallory's victory.[1] To support his petition, O'Connor cited to two Nevada election statutes, NRS 293.407(1) and NRS 293.410(2)(b). Under NRS 293.407(1), a registered voter in the proper political subdivision may challenge the election of ''any candidate,'' except for the office of United States Senate or House of Representatives. NRS 293.410(2)(b) provides a basis upon which a challenge may be brought: ''That a person who has been declared elected to an office was not at the time of election eligible to that office.'' O'Connor further argued in his petition that Mallory was not eligible to serve a fourth term as district attorney because Article 15, Section 3(2) of the Nevada Constitution limits district attorneys' duration of service to no more than 12 years. Mallory opposed the petition, contending that the constitutional term-limits provision did not apply to district attorneys. The district court ultimately entered an order denying O'Connor's petition to remove Mallory as district attorney. This appeal followed.[2]

DISCUSSION

Standard of review

[Headnotes 1-4]

This court reviews questions of constitutional interpretation de novo. *Lawrence v. Clark County*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011). When interpreting a constitutional provision, we first look to the language itself and will give effect to its plain meaning, unless the provision is ambiguous. *Secretary of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1119-20 (2008). A constitutional provision is considered ambiguous when it is capable of at least two reasonable yet inconsistent interpretations. *Id*. at 590, 188 P.3d at 1120. When courts engage in constitutional interpretation, the document should be reviewed as a whole in order to ascertain the meaning of any particular provision. *Killgrove v. Morriss*, 39 Nev. 224, 226-27, 156 P. 686, 687 (1916).

Nevada's Constitution

[Headnote 5]

Under Nevada's Constitution, individuals elected to a ''state office'' or a ''local governing body'' may only serve for 12 years, unless the Constitution provides otherwise:

---

[1]On appeal, this court determined that the appointment of pro bono counsel to represent O'Connor would assist the court in resolving the issues presented. Thus, after the district court proceeding, O'Connor was appointed pro bono counsel.

[2]The Nevada Association of Counties, the Nevada District Attorneys Association, Pershing County, and the Pershing County Assessor were granted permission to file amici curiae briefs in this matter.

> No person may be elected to any state office or local governing body who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, unless the permissible number of terms or duration of service is otherwise specified in this Constitution.

Nev. Const. art. 15, § 3(2). This constitutional provision does not act as a wholesale implementation of term limits on all nonjudicial elected governmental officials.[3] Instead, Article 15, Section 3(2) sets forth two separate and distinct categories of public officials who are subject to term limits: those elected to a state office and those elected to a local governing body.

[Headnote 6]

On appeal, O'Connor contends that under Article 15, Section 3(2), Mallory is barred from holding the office of district attorney because the office of district attorney is a ''state office,'' and thus, subject to term limits.[4] Mallory disagrees, arguing that in *Secretary of State v. Burk*, 124 Nev. at 591 n.38, 188 P.3d at 1120 n.38, this court held that state offices, for the purposes of Article 15, Section 3(2), are those defined by NRS 293.109 and that are subject to elections held statewide or within a subdivision of the state greater than the county. The district court determined that this court's decision in *Burk* foreclosed the possibility that a district attorney serves in a ''state office,'' and thus, rejected O'Connor's assertion that district attorneys are subject to term limits under Article 15, Section 3(2). The district court found further support for this conclusion in the fact that Article 4, Section 32 of the Nevada Constitution specifically labels district attorneys as ''county officers.''

Article 4, Section 32 of the Nevada Constitution addresses the Legislature's authority to provide for and abolish certain county offices. More specifically, this section provides, in relevant part, that ''[t]he Legislature shall have power to increase, diminish, consolidate or abolish the following county officers: County Clerks, County Recorders, Auditors, Sheriffs, District Attorneys and Public Administrators.'' Nev. Const. art. 4, § 32. The plain language of Article 4, Section 32 clearly declares that district attorneys are county officers. And because the Nevada Constitution plainly identifies district attorneys as county officers, it necessarily follows that the office of district attorney cannot be considered a ''state office,'' and therefore, district attorneys are not subject to term limits under the ''state office'' portion of Article 15, Section 3(2).

---

[3]Article 15, Section 3(2)'s term-limit provision does not apply to judicial officers. *Secretary of State v. Burk*, 124 Nev. 579, 584-85, 188 P.3d 1112, 1115-16 (2008).

[4]O'Connor does not challenge Mallory's service under the ''local governing body'' language of Article 15, Section 3(2), and thus, we will not address that language in this opinion.

[Headnote 7]

Both Mallory and the district court are correct that this court's decision in *Burk* sets forth the generally applicable test for determining whether an elected official is subject to term limits under the ''state office'' portion of Article 15, Section 3(2). 124 Nev. at 591 n.38, 188 P.3d at 1120 n.38. Under *Burk*, a determination of whether an elected office is considered a ''state office'' for term-limits purposes turns on whether the office is included in the list of state officers set forth in NRS 293.109[5] or is subject to election by the electors of the entire state or of a subdivision larger than a county. *Id*. (citing *Van Arsdell v. Shumway*, 798 P.2d 1298, 1301 (Ariz. 1990) (noting that the term state office refers to ''any other office for which the electors of the entire state or subdivision of the state greater than a county are entitled to vote'')). But ''the Nevada Constitution is the organic and fundamental law of this state,'' *Nevadans for Nevada v. Beers*, 122 Nev. 930, 948, 142 P.3d 339, 351 (2006), and it is well established that when courts interpret constitutional provisions, they should review the document as a whole to ascertain the meaning of a particular provision. *Killgrove*, 39 Nev. at 226-27, 156 P. at 687. Where, as here, the Nevada Constitution specifically sets forth the nature of a particular office—in this case declaring, in Article 4, Section 32, that the office of district attorney is a county office—this court will necessarily look first to the Constitution to determine whether that office falls under the ''state office'' portion of Article 15, Section 3(2), and thus, resorting to the *Burk* analysis becomes unnecessary.

CONCLUSION

Under Article 4, Section 32 of Nevada's Constitution, district attorneys are county officers, and therefore, the office of district attorney is not subject to the term-limits provision of Article 15, Section 3(2). As a result, we affirm the district court's denial of O'Connor's challenge to Mallory's reelection.[6]

CHERRY, C.J., and DOUGLAS, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

---

[5]NRS 293.109 identifies, for the purposes of Nevada's statutory scheme for elections, that ''state officer'' refers to the following positions: governor, lieutenant governor, secretary of state, state treasurer, state controller, attorney general, supreme court justice, district court judge, state senator, state assemblyperson, University of Nevada regent, or State Board of Education member.

[6]Having considered O'Connor's remaining arguments as to why the office of district attorney should be considered a ''state office'' for the purpose of Article 15, Section 3(2), we conclude that they lack merit. In addition, during our resolution of this appeal, this court directed the parties to address supplemental issues. In light of the basis upon which we resolve this appeal, these additional issues need not be reached.

ROLF JENSEN & ASSOCIATES, INC., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELISSA F. CADISH, DISTRICT JUDGE, RESPONDENTS, AND MANDALAY CORPORATION, REAL PARTY IN INTEREST.

No. 57461

August 9, 2012 282 P.3d 743

Original petition for a writ of mandamus challenging a district court order denying petitioner's motion for summary judgment in a tort action.

Construction consultant petitioned for writ of mandamus, challenging the district court's order denying summary judgment to consultant in resort's action against consultant to recover costs that resort expended to retrofit facilities to comply with Americans with Disabilities Act (ADA). The supreme court, SAITTA, J., held that: (1) as a matter of first impression, resort's state law claim for contractual indemnity against consultant was preempted by ADA; and (2) resort's remaining state law claims against consultant were reiterations of indemnity claim and thus also preempted by ADA.

Petition granted.

[Rehearing denied October 16, 2012]

Weil & Drage, APC, and *Jean A. Weil, John T. Wendland*, and *Thomas A. Larmore*, Henderson, for Petitioner.

Cotton, Driggs, Walch, Holley, Woloson & Thompson and *Dennis R. Haney*, Las Vegas; *Jones Day* and *Clark T. Thiel*, San Francisco, California, for Real Party in Interest.

Backus, Carranza & Burden and *Leland Eugene Backus* and *Shea A. Backus*, Las Vegas; *Lloyd, Gray, Whitehead & Monroe, PC*, and *E. Britton Monroe* and *R. Burns Logan*, Birmingham, Alabama, for Amicus Curiae Halcrow, Inc.

Watt, Tieder, Hoffar & Fitzgerald, LLP, and *David R. Johnson* and *Jared M. Sechrist*, Las Vegas, for Amicus Curiae Tishman Construction Corporation of Nevada.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, and *Michael M. Edwards, J. Scott Burris*, and *Chad C. Butterfield*, Las Vegas, for Amicus Curiae Converse Professional Group.

1. MANDAMUS.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.

2. MANDAMUS.
   Mandamus relief is not available when an adequate and speedy legal remedy exists. NRS 34.170.
3. MANDAMUS.
   The issue of whether an appeal constitutes an adequate and speedy remedy so as to preclude mandamus relief necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit supreme court to meaningfully review the issues presented.
4. MANDAMUS.
   Even when an appeal is not an adequate and speedy remedy, the supreme court typically will not entertain writ petition challenging the denial of a motion for summary judgment unless no factual dispute exists and summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification.
5. MANDAMUS.
   Appeal was not a speedy or adequate remedy so as to preclude mandamus proceeding to challenge district court's order denying summary judgment to construction consultant in resort's state law action against consultant seeking to recover costs resort expended to retrofit facilities to comply with Americans with Disabilities Act (ADA) on the ground that ADA preempted resort's state law claims; litigation was in early stages, and ADA preemption was issue of nationwide magnitude in need of clarification in state's courts. Americans with Disabilities Act of 1990, § 2 *et seq.*, 42 U.S.C. § 12101 *et seq*.
6. APPEAL AND ERROR.
   Whether state law claims are preempted by federal law is a question of law that the supreme court reviews de novo, without deference to the findings of the district court.
7. STATES.
   Under the preemption doctrine, which emanates from the Supremacy Clause, state law must yield when it frustrates or conflicts with federal law. U.S. CONST. art. 6, cl. 2.
8. STATES.
   ''Express preemption'' of state law occurs when Congress explicitly states that intent in a federal statute's language. U.S. CONST. art. 6, cl. 2.
9. STATES.
   ''Implied preemption'' of state law arises when state law is preempted but Congress did not include statutory language expressly preempting state law.
10. STATES.
    ''Field preemption'' of state law, as a sub-branch of implied preemption, applies when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field. U.S. CONST. art. 6, cl. 2.
11. STATES.
    ''Conflict preemption'' of state law, or obstacle preemption, as it is oftentimes called, is a sub-branch of implied preemption and occurs when federal law actually conflicts with any state law; conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives. U.S. CONST. art. 6, cl. 2.

12. INDEMNITY; STATES.
    Resort's state law claim for contractual indemnity against construction consultant to recover costs resort expended to retrofit its facilities to comply with Americans with Disabilities Act (ADA) was preempted by ADA; permitting such indemnity claims would diminish property owners' incentives to comply with ADA requirements and thus would conflict with purpose and intended effects of ADA. Americans with Disabilities Act of 1990, § 2(b), 42 U.S.C. § 12101(b).
13. STATES.
    In resolving the issue of whether state law claims are preempted by federal law, the supreme court analyzes the substance of the claims, not simply their labels. U.S. CONST. art. 6, cl. 2.
14. CONTRACTS; FRAUD; STATES.
    Resort's state law claims against construction consultant for breach of contract, breach of express warranty, and negligent misrepresentation were preempted by Americans with Disabilities Act (ADA), where such claims were merely reiterations of resort's claim for indemnity against consultant that also was preempted by ADA. Americans with Disabilities Act of 1990, § 2(b), 42 U.S.C. § 12101(b).

Before the Court EN BANC.[1]

OPINION

By the Court, SAITTA, J.:

In this original petition for a writ of mandamus, we are asked to consider whether the Americans with Disabilities Act of 1990 (ADA) preempts state law claims for indemnification brought by an admitted violator of the ADA. After examining the purpose and intended effects of the ADA, we conclude that such claims pose an obstacle to the objectives of the ADA and therefore are preempted. Accordingly, we grant the petition.

FACTS

In 2002, real party in interest Mandalay Corporation entered into a contract with petitioner Rolf Jensen & Associates, Inc., whereby Rolf Jensen would provide consulting services regarding construction of an expansion to the Mandalay Bay Resort and Casino (the Resort) in Las Vegas in compliance with the ADA. The parties' contract contained a provision providing that Rolf Jensen would indemnify Mandalay for any damages arising from any act, omission, or willful misconduct by Rolf Jensen in its performance of its obligations. After the Resort expansion was constructed, the Department of Justice (DOJ) began an investigation of numerous violations of the ADA arising from a lack of handicap

[1]THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused herself from participation in the decision of this matter.

accessibility at the Resort. Thereafter, Mandalay entered into a comprehensive settlement agreement with the DOJ that required Mandalay to bring the Resort into compliance with the ADA. Mandalay estimates that these retrofits will cost it more than $20 million.

Mandalay subsequently sued Rolf Jensen in district court, seeking to recover the costs it will incur to retrofit the Resort. After preliminary motion practice, the following claims remained pending against Rolf Jensen: (1) express indemnification, (2) breach of contract, (3) breach of express warranty, and (4) negligent misrepresentation. Rolf Jensen filed a motion for summary judgment, asserting that these claims are each preempted by the ADA and that, alternatively, Mandalay's claim for negligent misrepresentation is barred by the economic loss doctrine. The district court denied Rolf Jensen's motion for summary judgment. Rolf Jensen now petitions this court for a writ of mandamus directing the district court to grant its motion.

DISCUSSION

Rolf Jensen maintains that the district court was required to grant its motion for summary judgment because Mandalay's claims are each preempted by the ADA and, in addition, Mandalay's negligent misrepresentation claim is barred by the economic loss doctrine. Rolf Jensen contends that consideration of its petition is appropriate given the important questions of law involved and notions of judicial economy.

[Headnotes 1-4]

''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted); NRS 34.160. ''Writ relief is not available, however, when an adequate and speedy legal remedy exists'' and, as we have explained, an appeal generally constitutes a sufficient remedy. *International Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; NRS 34.170. The issue of whether an appeal is an adequate and speedy remedy ''necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.'' *D.R. Horton v. Dist. Ct.*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007). Even when an appeal is not an adequate and speedy remedy, we typically will not entertain writ petitions challenging the denial of a motion for summary judgment unless ''no factual dispute exists and summary judgment is clearly required by a

statute or rule, or an important issue of law requires clarification.'' *Walters v. Dist. Ct.*, 127 Nev. 723, 727, 263 P.3d 231, 234 (2011).

[Headnote 5]

Here, an appeal is not a speedy or adequate remedy in light of the relatively early stages of litigation and considerations of sound judicial administration. Next, the issue of preemption under the ADA is an issue of nationwide magnitude in need of clarification in the courts of this state. Accordingly, we exercise our discretion to entertain this writ petition.

Preemption

[Headnotes 6-9]

Whether state law claims are preempted by federal law is a question of law that we review de novo, without deference to the findings of the district court. *Nanopierce Tech. v. Depository Trust*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). The preemption doctrine emanates from the Supremacy Clause of the United States Constitution, pursuant to which state law must yield when it frustrates or conflicts with federal law. *Id.* The doctrine is comprised of two broad branches: express and implied preemption. *Id.* Express preemption occurs, as its name suggests, when Congress ''explicitly states that intent in a statute's language.'' *Id.* at 371, 168 P.3d at 79. Implied preemption arises, in contrast, ''[w]hen Congress does not include statutory language expressly preempting state law.'' *Id.*

[Headnotes 10, 11]

Implied preemption contains two sub-branches: field and conflict preemption. *Id.* Field preemption applies ''when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field.'' *Id.* Conflict preemption, or obstacle preemption, as it is oftentimes called, occurs when ''federal law actually conflicts with any state law.'' *Id.* at 371, 168 P.3d at 80. As we have explained:

> Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives.

Id. at 371-72, 168 P.3d at 80.

This petition involves conflict preemption. More precisely, this petition concerns whether, in view of the ADA's purpose and intended effects, Mandalay's state law claims pose an obstacle to the accomplishment of Congress's objectives in enacting the ADA.

As a threshold matter, we note that the United States Supreme Court has set forth ''two cornerstones'' of preemption that we must factor into our analysis of this issue. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, the Court has explained that '' 'the purpose of Congress is the ultimate touchstone in every preemption case.' '' *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Second, the Court has instructed that '' '[i]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' '' *Id.* (alterations in original) (quoting *Lohr*, 518 U.S. at 485). The second principle, known as the presumption against preemption, arises out of ''respect for the States as 'independent sovereigns in our federal system.' '' *Id.* at 565 n.3 (quoting *Lohr*, 518 U.S. at 485).

This writ petition involves Congress's legislation in the area of disability discrimination. Although states have the ''police powers to prohibit discrimination on specified grounds,'' *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 981 (9th Cir. 2005), historically states have, at best, played a junior role in this area. *See Alexander v. Choate*, 469 U.S. 287, 295-96 (1985) (explaining that Congress enacted provisions prohibiting discrimination against disabled persons precisely because such persons had otherwise been neglected). Thus, because this petition does not involve a legislative landscape traditionally occupied by the states, the presumption against preemption does not apply with particular force here. *See Wyeth*, 555 U.S. at 565 n.3 (noting that the force given to the presumption against preemption is guided by ''the historic presence of state law''). With these overarching principles in mind, we consider the purpose and intended effects of the ADA.

The ADA

In enacting the ADA, Congress declared:

> It is the purpose of this chapter—
>
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to

> regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b) (2006).

Thus, the goal of the ADA is twofold. It is intended not only to remedy discrimination against disabled individuals but to prevent it. ''To effectuate its sweeping purpose,'' the ADA has a comprehensive scope covering discriminatory practices that disabled persons face ''in major areas of public life,'' including access to public accommodations. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001). But Congress was not simply concerned with intentional discrimination when it enacted the ADA. It also specifically designed the provisions of the ADA to prevent discrimination stemming from neglect and indifference. *See id.* As such, regardless of the intent of an owner of a place of public accommodation, when, as here, a facility is not constructed to be readily accessible to individuals with disabilities, the owner is liable for unlawful discrimination. *See* 42 U.S.C § 12182(a) (2006) (prohibiting the discrimination against disabled individuals ''in the full and equal enjoyment of . . . facilities . . . or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation''); 42 U.S.C. § 12183(a)(1) (2006) (explaining that ''discrimination'' for purposes of the ADA includes ''a failure to design and construct facilities for first occupancy . . . that are readily accessible to and usable by individuals with disabilities''). Notably, however, with the exception of landlord-tenant relationships, 28 C.F.R. § 36.201(b) (2010), there are no provisions within the ADA, or its accompanying regulations, that permit indemnification or the allocation of liability between the various entities subject to the ADA.

Mandalay's indemnification claim

Having examined the germane aspects of the ADA, we now turn to the parties' specific arguments with respect to whether Mandalay's state law claims are preempted by the ADA. Regarding Mandalay's indemnification claim, Rolf Jensen argues that such claims are preempted because they diminish owners' incentive to comply with the ADA, thereby frustrating Congress's goal of preventing disability discrimination.

Mandalay responds that its indemnification claim, in fact, advances the purpose of the ADA. Specifically, it argues that if owners of places of public accommodation are able to seek indemnification from ADA consultants, such as Rolf Jensen, then they will be more inclined to hire these consultants, which have the overall effect of promoting ADA compliance. Mandalay also asserts that it would simply be unfair to preempt its indemnification claim and force it to bear the cost of retrofitting the Resort, while Rolf Jensen, who was a direct factor in causing these expenses, escapes

responsibility. Finally, Mandalay contends that enforcing the parties' indemnification provision does not interfere with the purpose of the ADA because it does not deprive disabled persons the right to seek relief for violations of the ADA.

Courts in other jurisdictions have ''flatly rejected'' the type of indemnification claim brought by Mandalay. *See* 1 John P. Relman, *Housing Discrimination Practice Manual* § 2:9 (2011). The leading case in this regard is *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010). In *Niles Bolton*, the United States Court of Appeals for the Fourth Circuit reasoned that permitting an owner to, in essence, circumvent responsibility for its violations of the ADA and the Fair Housing Act (FHA) through an indemnification claim would lessen the owner's incentive to ensure compliance with the ADA and FHA.[2] *Id.* at 602. The court therefore concluded that such claims are preempted:

> Allowing an owner to completely insulate itself from liability for an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws. If a developer . . . , who concededly has a non-delegable duty to comply with the ADA and FHA, can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices . . . . Such a result is antithetical to the purposes of the FHA and ADA.

Id.

Likewise, the federal district courts that have considered this issue have each uniformly concluded that owners' indemnification claims for their own ADA violations undermine the goals of the ADA. *See United States v. The Bryan Co.*, No. 3:11-CV-302-CWR-LRA, 2012 WL 2051861, at *5 (S.D. Miss. Jun. 6, 2012) (permitting indemnification claims for violations of the ADA or FHA ''would frustrate, 'disturb, interfere with, or seriously compromise the purposes of the' FHA and ADA'' (quoting *Morgan*

---

[2]Notwithstanding Mandalay's criticisms, this view of indemnification claims has long been embraced by courts, in various statutory contexts. *See, e.g.*, *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir. 1986) (state indemnification actions against supervisory personnel by employers who have been sued for violations of the Fair Labor Standards Act (FLSA) are preempted because ''an employer who believed that any violation of the [FLSA] could be recovered from its employees would have a diminished incentive to comply with the statute and might be inclined to close its eyes [to violations of the FLSA]''); *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 676 (9th Cir. 1980) (permitting indemnification for violations of the Securities Act of 1933 ''would undermine the statutory purpose of assuring diligent performance of duty and deterring negligence'').

City v. South Louisiana Elec. Co-Op., 31 F.3d 319, 322 (5th Cir. 1994))); *Equal Rights Center v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 824 (D. Md. 2009) (''[I]ndemnification is antithetical to Congress' purpose in enacting the FHA and the ADA.''); *United States v. Murphy Development, LLC*, No. 3:08-0960, 2009 WL 3614829, at *2 (M.D. Tenn. Oct. 27, 2009) (''[A]llowing recovery under state law for indemnity and/or contribution would frustrate the achievement of Congress' purposes in adopting the FHA and the ADA.'').

[Headnote 12]

We agree with these courts that permitting indemnification claims would weaken owners' incentive to prevent violations of the ADA and therefore would conflict with the ADA's purpose and intended effects. Simply put, such claims would allow owners to contractually maneuver themselves into a position where, in essence, they can ignore their nondelegable responsibilities under the ADA. As previously noted, eliminating this type of neglectful environment was one of the specific aims of Congress in enacting the ADA. It follows that if owners were permitted to pursue indemnification for their own ADA violations, Congress's goal of preventing discrimination would be frustrated. In addition, such claims would intrude upon the remedial scheme set forth in the ADA, which, we reiterate, does not provide for a right to indemnification, despite having a sweeping and comprehensive scope. *See Access 4 All, Inc. v. Trump International Hotel and Tower Condominium*, No. 04-CV-7497KMK, 2007 WL 633951, at *7 (S.D.N.Y. Feb. 26, 2007) (examining New York state law and explaining that even if it provided for a right to indemnity for a party's own ADA violations, ''it would raise the specter that any state-law right to indemnity would be pre-empted by the extensive remedial scheme of the ADA''). Thus, as Rolf Jensen argues, and as every court to squarely consider this issue has held,[3] the ADA preempts indemnification claims brought by owners for their violations thereof because such claims would pose an obstacle to the ADA.

With respect to Mandalay's assertion that permitting indemnification claims would have the overall effect of promoting ADA compliance by encouraging owners to seek advice from ADA consultants, we disagree. Owners are motivated to seek this advice to

[3]The only authority critical of this view is a law review note. *See* Charles Daugherty, Note, *Who Needs Contract Law?—A Critical Look at Contractual Indemnification (or Lack Thereof) in FHAA and ADA ''Design and Construct'' Cases*, 44 Ind. L. Rev. 545, 547 (2011). As with the arguments advanced by Mandalay, we find the analysis contained in this authority unpersuasive.

aid in *their* duty to construct facilities in compliance with the ADA; indeed, that is the very point of seeking such assistance. Mandalay's suggestion that owners only contract with these consultants in order to obtain indemnification understates the role qualified consultants play in owners' efforts to meet ADA requirements. Moreover, the debilitating effect that such a mindset has on ADA compliance, as dramatically illustrated by the numerous violations of the ADA in this case, is palpable. As previously explained, the surest way to maximize compliance with the ADA is to hold owners' risks of noncompliance firmly in place.

We also disagree with Mandalay's contention that it is simply unfair to preempt its indemnification claim. In today's commercial construction industry, it is surely an owner such as Mandalay—a highly sophisticated entity with ultimate authority over all construction decisions—who is in the best position to prevent violations of the ADA. Furthermore, contrary to Mandalay's contention, Rolf Jensen is not immunized from liability for the role that it allegedly played in Mandalay's violations of the ADA. Rolf Jensen's liability, however, simply runs to disabled individuals rather than to Mandalay. *See Archstone Smith*, 603 F. Supp. 2d at 824 (any entity who contributes to a violation of the ADA may be directly liable); *U.S. v. Days Inns of America, Inc.*, 997 F. Supp. 1080, 1083 (C.D. Ill. 1998) (''[A]rchitects, builders, [and] planners,'' among others, are within the ADA's ''broad sweep of liability.'').

Mandalay is correct that its indemnification claim does not directly interfere with the rights of disabled individuals to obtain relief under the ADA. Mandalay overlooks, however, that the goal of the ADA is not simply to remedy discrimination against individuals with disabilities but to prevent it in the first place. *See* 42 U.S.C. § 12101(b) (2006). Thus, although Mandalay's indemnification claim may not interfere with the remedial components of the ADA, as detailed above, it thwarts the prophylactic aspects of the ADA.

Mandalay has not cited any case that has directly addressed this issue and concluded that claims for indemnification are not preempted by the ADA. The only decision cited by Mandalay to arguably indicate that such claims might be viable is *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 755 (D. Or. 1997), wherein the court stated that an owner and architect responsible for violations of the ADA ''can decide later, as between themselves, who will be responsible for any costs that [the owner] may incur as a result . . . .'' Mandalay seizes on this statement, arguing that the remark shows that indemnification claims are permitted. But *Oregon Arena* is not so broad. The court was

simply commenting on a possible dispute between the owner and the architect. In fact, the architect was not a party to the dispute that the court was considering. *Id.* And, to the extent it can be said that *Oregon Arena* speaks to the question at issue here, the court cited no authority and provided no analysis of preemption; thus, Mandalay's reliance on *Oregon Arena* is misplaced.

Mandalay also cites to 28 C.F.R. § 36.201(b) (2010), which provides, in pertinent part, that ''allocation of responsibility for complying with the obligations of [the ADA]'' is permitted between landlords and tenants. Despite the selective quotations of this regulation in Mandalay's briefs, by its plain language, this provision only applies in the landlord-tenant context. The inclusion of a right to indemnification for landlords and tenants undermines Mandalay's argument because the regulation's omission of other entities appears intentional. *See Matter of Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006) (recognizing the general rule of construction that when one thing is mentioned the exclusion of another is implied). Equally misguided is Mandalay's reliance on decisions that have cited this regulation in concluding that indemnification is permitted between landlords and tenants. *See, e.g.*, *Botosan v. Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000). As the Fourth Circuit Court of Appeals has explained, ''[t]he history of [28 C.F.R. § 36.201(b)] demonstrates that this allocation provision is unique to the landlord-tenant relationship and does not impact the relationships between architects, builders, and other parties.'' *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597, 602 n.1 (4th Cir. 2010).

The remaining authorities cited by Mandalay are distinguishable. Mandalay relies upon *Meyer v. Holley*, 537 U.S. 280, 285 (2003), where the Supreme Court stated that an action brought under the FHA ''is, in effect, a tort action,'' and that ''when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.'' Mandalay also cites *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 162 (2003), where the Court indicated that an employer liable under the Federal Employers' Liability Act may seek contribution or indemnification from concurrently liable third parties in accordance with the traditional principles of tort law. Mandalay argues that the ADA essentially creates tort liability and, because indemnification is a traditional principle of tort law, Congress intended for the ADA to incorporate the right to such relief. But neither *Meyer* nor *Norfolk* involved preemption, much less the specific issue of preemption by the ADA, and we are aware of no case that has cited these decisions for the proposition advanced by Mandalay. Also unpersuasive

is Mandalay's reliance on *American Federal Savings v. Washoe County*, 106 Nev. 869, 875-76, 802 P.2d 1270, 1275 (1990), where this court concluded that a third-party tortfeasor's contractual right to express indemnification from an employer based upon an employee's injury was not voided by Nevada's workers' compensation scheme. As with *Meyer* and *Norfolk*, *American Federal* is distinguishable because it did not concern preemption by the ADA. In sum, the few authorities that Mandalay has patched together in support of its position are unavailing. Therefore, we conclude that Mandalay's indemnification claim is preempted by the ADA.

Mandalay's remaining state law claims

Rolf Jensen also argues that Mandalay's claims for breach of contract, breach of express warranty, and negligent misrepresentation are preempted by the ADA because, in substance, these claims are merely a reiteration of Mandalay's claim for indemnification.

Mandalay responds that it does not simply seek indemnification through these claims. Rather, it contends that it seeks separate and distinct relief for Rolf Jensen's breach of its contractual and professional obligations to provide advice that would prevent violations of the ADA.

Niles Bolton is instructive on this issue. There, the Fourth Circuit held that although an owner may attempt to plead an indemnification claim in the garb of breach of contract and negligence theories, when the relief the owner seeks is recovery of all the losses arising from its violations of the ADA and FHA, such claims are ''*de facto* indemnification claims and, thus, preempted.'' 602 F.3d at 602; *see also Equal Rights Center v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 824 (D. Md. 2009) (concluding that claims for breach of contract and professional negligence were preempted where they were ''wholly derivative of [the owner's] primary liability'' under the ADA and FHA).

[Headnote 13]

Like these courts, in resolving the issue of whether state law claims are preempted by federal law, we analyze their substance, not simply their labels. *See, e.g.*, *Cervantes v. Health Plan of Nevada*, 127 Nev. 789, 793 n.4, 263 P.3d 261, 264 n.4 (2011) (although a party may plead different theories, claims based upon the same substantive allegations ''necessarily stand or fall together'' when considering whether they are preempted). Consequently, if, as Rolf Jensen asserts, Mandalay's claims for breach of contract, breach of express warranty, and negligent misrepresentation are simply a subterfuge for Mandalay's indemnification claim, then those claims are preempted by the ADA.

[Headnote 14]

A close reading of Mandalay's third amended complaint reveals that each of its claims and requested damages derive solely from its first-party liability for its admitted violations of the ADA. While Mandalay argues that its claims have an independent basis, what Mandalay seeks to recover, and what each of its claims are predicated upon, is the cost of retrofitting the Resort as required by its settlement with the DOJ. Indeed, were it not for this settlement, Mandalay would not have brought these claims against Rolf Jensen in the first place. Accordingly, we conclude that Mandalay's claims for breach of contract, breach of express warranty, and negligent misrepresentation are de facto claims for indemnification and thus are preempted by the ADA.[4]

CONCLUSION

We conclude that Mandalay's state law claims for indemnification pose an obstacle to the objectives of the ADA and therefore are preempted.[5] Accordingly, we grant Rolf Jensen's petition for extraordinary relief and direct the clerk of this court to issue a writ of mandamus instructing the district court to grant Rolf Jensen's motion for summary judgment.[6]

CHERRY, C.J., and DOUGLAS, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.

---

[4]We have considered Mandalay's remaining contentions and conclude that they are without merit.

[5]In view of our disposition, we need not address whether Mandalay's negligent misrepresentation claim is also barred by the economic loss doctrine.

[6]In light of this opinion, we vacate the stay ordered by this court on July 20, 2011.

CONSIPIO HOLDING, BV, A CORPORATION ORGANZIED UNDER THE LAWS OF THE NETHERLANDS; ILAN BUNIMOVITZ, AN INDIVIDUAL; TISBURY SERVICES, INC., A CORPORATION ORGANIZED UNDER THE LAWS OF THE BRITISH VIRGIN ISLANDS; AND CLAUDIO GIANASCIO, AN INDIVIDUAL, APPELLANTS, *v.* JOHAN CARLBERG; PETER DIXINGER; BO RODEBRANT; JOHAN GILLBORG; AND PHILIP CHRISTMAS, RESPONDENTS.

No. 58128

August 9, 2012 282 P.3d 751

Appeal from a district court order, certified as final pursuant to NRCP 54(b), that dismissed a complaint as to several defendants for lack of personal jurisdiction. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Shareholders of domestic corporation brought derivative action against nonresident officers and directors of corporation, asserting claims for misfeasance, malfeasance, and breach of fiduciary duty. The district court granted nonresident officers' and directors' motions to dismiss for lack of personal jurisdiction. Shareholders appealed. The supreme court, GIBBONS, J., held that district court could exercise personal jurisdiction over nonresident officers and directors.

Vacated and remanded.

Lionel Sawyer & Collins and *Meredith L. Markwell* and *Charles H. McCrea, Jr.*, Las Vegas, for Appellants.

Laxalt & Nomura, Ltd., and *Justin C. Vance* and *Robert A. Dotson*, Reno, for Respondents.

1. COURTS.
   A district court can exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation. NRS 78.135(1).
2. COURTS.
   Under the fiduciary shield doctrine, a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person; the doctrine does not limit jurisdiction in states that have statutes that extend jurisdiction to the limits of due process; Nevada's long-arm statute extends jurisdiction to the limits of due process. NRS 14.065(1).
3. COURTS.
   When a party challenges personal jurisdiction, the plaintiff typically has the burden of producing evidence that establishes a prima facie showing of jurisdiction.
4. COURTS.
   A plaintiff may make a prima facie showing of personal jurisdiction before trial and then prove jurisdiction by a preponderance of the evidence at trial.

5. APPEAL AND ERROR.
   The supreme court reviews a district court's order dismissing case for lack of personal jurisdiction de novo.
6. CONSTITUTIONAL LAW.
   In order for a district court to exercise personal jurisdiction over nonresident defendant, due process requires minimum contacts between defendant and forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S. CONST. amend. 14; NRS 14.065(1).
7. CONSTITUTIONAL LAW.
   In order for a district court to exercise personal jurisdiction over nonresident defendant consistent with due process, defendant's conduct and connection with the forum state must be such that defendant should reasonably anticipate being haled into court there. U.S. CONST. amend. 14; NRS 14.065(1).
8. COURTS.
   The district court may exercise specific personal jurisdiction over nonresident defendant only when the cause of action arises from defendant's contacts with the forum. U.S. CONST. amend. 14; NRS 14.065(1).
9. CONSTITUTIONAL LAW; COURTS.
   Specific personal jurisdiction over nonresident defendant is appropriate when defendant has purposefully established minimum contacts with forum state such that jurisdiction would comport with fair play and substantial justice. U.S. CONST. amend. 14; NRS 14.065(1).
10. COURTS.
    To exercise specific personal jurisdiction over a nonresident defendant, defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state; the cause of action must arise from the consequences in the forum state of defendant's activities, and those activities, or the consequences thereof, must have a substantial enough connection with forum state to make exercise of jurisdiction over defendant reasonable. U.S. CONST. amend. 14; NRS 14.065(1).
11. COURTS.
    Questions involving personal jurisdiction mandate an inquiry into whether it is reasonable to require nonresident defendant to defend the particular suit in the jurisdiction where it is brought. U.S. CONST. amend. 14; NRS 14.065(1).
12. COURTS.
    Factors to consider in determining whether court's assumption of personal jurisdiction over nonresident defendant is reasonable include: (1) the burden on defendant of defending an action in foreign forum, (2) forum state's interest in adjudicating the dispute, (3) plaintiff's interest in obtaining convenient and effective relief, (4) interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) shared interest of the several states in furthering fundamental substantive social policies. U.S. CONST. amend. 14; NRS 14.065(1).
13. CORPORATIONS AND BUSINESS ORGANIZATIONS.
    For purposes of analysis of personal jurisdiction, a corporation is a citizen of the state where it is created.
14. COURTS.
    The district court could exercise personal jurisdiction over nonresident officers and directors of Nevada corporation where shareholders alleged that nonresident officers and directors were directly causing harm to corporation and statute authorized lawsuits against officers and directors

of corporations for violations of their authority. U.S. CONST. amend. 14; NRS 14.065(1), 78.135(1).

15. APPEAL AND ERROR.
Statutory interpretation is a question of law that the supreme court reviews de novo.

16. STATUTES.
When a statute is clear and unambiguous, the court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.

17. COURTS.
Nevada statute provides notice to officers and directors that they are subject to derivative suits in violation of their authority; through this notice, an officer or director understands that by violating his or her authority as a Nevada corporation's officer or director, he or she is subject to suit under Nevada laws in Nevada.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider whether Nevada courts can properly exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation. We conclude that they can. Here, the district court failed to conduct adequate factual analysis to determine whether it could properly exercise personal jurisdiction over the respondents before dismissing the complaint against them. Accordingly, we vacate the dismissal order and remand this matter to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Appellants Consipio Holding, BV; Ilan Bunimovitz; Tisbury Services, Inc.; and Claudio Gianascio (collectively, Consipio) are shareholders of Private Media Group, Inc. (PRVT). In August 2010, Consipio filed a complaint in the Nevada district court, seeking injunctive relief and the appointment of a receiver for PRVT. Consipio also asserted derivative claims on behalf of PRVT against PRVT's former CEO and president, Berth H. Milton, Jr.,[1] and against officer and director respondents Johan Carlberg (PRVT director), Peter Dixinger (PRVT director), Bo Rodebrant (PRVT director), Johan Gillborg (former PRVT CFO), and Philip Christmas (PRVT subsidiary CFO). The claims focus on respondents' alleged conduct in assisting Milton, Jr., to financially harm PRVT for their personal gain. The complaint alleges that respondents assisted Milton, Jr., in obtaining significant loans for himself and entities he controls. It further states that respondents have failed to

[1]Milton, Jr., is not a party to this appeal.

demand repayment on these loans and that they have helped Milton, Jr., in removing funds from PRVT and concealing the wrongdoing. Given these allegations, Consipio contends that respondents collectively have been guilty of misfeasance, malfeasance, and breach of their fiduciary duties.

PRVT is incorporated in Nevada with its principal place of business in Spain. Respondents are all citizens and residents of European nations. Only three of the respondents, Dixinger, Carlberg, and Gillborg, have visited Nevada in the past. Dixinger visited Nevada in order to consult with attorneys in preparation for this matter, and Carlberg and Gillborg each visited Nevada once several years ago for personal reasons. Citing a lack of contacts with Nevada, each of the respondents moved to dismiss the action against them for lack of personal jurisdiction. Without conducting an evidentiary hearing, the district court granted their motions and certified its dismissal orders as final under NRCP 54(b).

[Headnotes 1, 2]

Consipio now appeals, contending that the district court erred in granting respondents' motions to dismiss for lack of personal jurisdiction. Consipio contends that respondents' conduct created sufficient minimum contacts with Nevada and that NRS 78.135(1) confers jurisdiction over nonresident officers and directors who violate their corporate authority. We conclude that a district court can exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation.[2]

DISCUSSION

[Headnotes 3-5]

When a party challenges personal jurisdiction, the plaintiff typically has the burden of producing evidence that establishes a prima facie showing of jurisdiction. *See Trump v. District Court*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993). ''[A] plaintiff may make a prima facie showing of personal jurisdiction prior to trial and then prove jurisdiction by a preponderance of the evidence at trial.'' *Id.* We review a district court's order dismissing for lack of personal jurisdiction de novo. *Baker v. Dist. Ct.*, 116 Nev.

---

[2]Consipio also contends that the fiduciary shield doctrine does not protect the respondents from being subject to personal jurisdiction in Nevada. ''Under the fiduciary shield doctrine, a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person.'' *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 520 (9th Cir. 1989). In *Davis*, the Ninth Circuit Court of Appeals noted that the fiduciary shield doctrine does not limit jurisdiction in states that have statutes that extend jurisdiction to the limits of due process. *Id.* at 522. Because the Nevada long-arm statute extends jurisdiction to the limits of due process, we agree that the fiduciary shield doctrine does not apply. *See* NRS 14.065(1).

527, 531, 999 P.2d 1020, 1023 (2000); *see CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011).

A district court can exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation

[Headnotes 6, 7]

Nevada's long-arm statute permits personal jurisdiction over a nonresident defendant unless the exercise of jurisdiction would violate due process. NRS 14.065(1). ''Due process requires 'minimum contacts' between the defendant and the forum state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' '' *Trump*, 109 Nev. at 698, 857 P.2d at 747 (quoting *Mizner v. Mizner*, 84 Nev. 268, 270, 439 P.2d 679, 680 (1968)). ''[T]he defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there.'' *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

[Headnotes 8-10]

The parties agree that specific, not general, personal jurisdiction is at issue here. A court may exercise specific personal jurisdiction over a defendant only when ''the cause of action arises from the defendant's contacts with the forum.'' *Trump*, 109 Nev. at 699, 857 P.2d at 748. Specific personal jurisdiction is appropriate when the defendant has ''purposefully established minimum contacts'' such that jurisdiction would ''comport with 'fair play and substantial justice.' '' *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). To exercise specific personal jurisdiction over a nonresident defendant,

> [t]he defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. The cause of action must arise from the consequences in the forum state of the defendant's activities, and those activities, or the consequences thereof, must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Jarstad v. National Farmers Union, 92 Nev. 380, 387, 552 P.2d 49, 53 (1976).

[Headnotes 11, 12]

Questions involving personal jurisdiction mandate an inquiry into whether it is '' 'reasonable . . . to require [the defendant] to defend the particular suit [in the jurisdiction where it is brought].' '' *Trump*, 109 Nev. at 701, 857 P.2d at 749 (first and second alterations in original) (quoting *World-Wide Volkswagen*

Corp., 444 U.S. at 292). Factors to consider in determining whether assuming personal jurisdiction is reasonable include:

> (1) ''the burden on the defendant'' of defending an action in the foreign forum, (2) ''the forum state's interest in adjudicating the dispute,'' (3) ''the plaintiff's interest in obtaining convenient and effective relief,'' (4) ''the interstate judicial system's interest in obtaining the most efficient resolution of controversies,'' and (5) the ''shared interest of the several States in furthering fundamental substantive social policies.''

Emeterio v. Clint Hurt and Assocs., 114 Nev. 1031, 1036-37, 967 P.2d 432, 436 (1998) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

[Headnotes 13, 14]

A corporation that is incorporated in Nevada is a Nevada citizen. *Quigley v. C. P. R. R. Co.*, 11 Nev. 350, 357 (1876) (''[A] corporation is a citizen of the state where it is created.''). When officers or directors directly harm a Nevada corporation, they are harming a Nevada citizen. By purposefully directing harm towards a Nevada citizen, officers and directors establish contacts with Nevada and ''affirmatively direct[ ] conduct'' toward Nevada. *Trump*, 109 Nev. at 700, 857 P.2d at 748. Further, officers or directors ''caus[e] important consequences'' in Nevada when they directly harm a Nevada corporation. *See Jarstad*, 92 Nev. at 387, 552 P.2d at 53. When a cause of action arises out of an officer's or director's purposeful contact with Nevada, a district court can exercise personal jurisdiction over that officer or director. *See id.*

Respondents rely on the United States Supreme Court's holding in *Shaffer v. Heitner* to assert that allowing a district court to exercise personal jurisdiction over them would offend due process. 433 U.S. 186 (1977). However, *Shaffer* does not prohibit a state court from exercising jurisdiction over nonresident officers and directors who directly harm a corporation that is incorporated in that state, even when the state does not have a director consent statute.[3] In *Shaffer*, the plaintiffs filed a complaint in Delaware against a Delaware corporation's directors who exposed the corporation to claims of third parties in another state. *Id.* at 189-90. The cause of action arose from activities that took place outside Delaware. *Id.* at 190. The plaintiffs asserted that Delaware courts could exercise personal jurisdiction given the presence of the defendant's property in the jurisdiction. *Id.* at 213. However, the United States Supreme Court held that the directors were not subject to personal jurisdiction in Delaware because the property was not the matter of the lit-

[3]A director consent statute notices directors that by accepting a position as a director of a corporation, the director consents to service of process in that jurisdiction. *See, e.g.*, Del. Code Ann. tit. 10, § 3114 (Supp. 2010).

igation and the plaintiff did not ''identify any act related to his cause of action as having taken place in Delaware.'' *Id.* at 213. The Court also noted that Delaware did not have a director consent statute that would treat the acceptance of election as a director as consent to jurisdiction in Delaware. *Id.* at 214-15.

Unlike the directors in *Shaffer*, the complaint in this case does not assert that respondents are harming a corporation by opening it up to liability in other jurisdictions; rather, they allegedly are causing direct harm to a Nevada citizen in Nevada for personal gain. Officers or directors who directly harm a Nevada corporation are affirmatively directing conduct toward Nevada, and by doing so can be subject to personal jurisdiction even without a director consent statute. *See DeCook v. Environmental Sec. Corp., Inc.*, 258 N.W.2d 721, 728-30 (Iowa 1977) (holding that the exercise of personal jurisdiction over a domestic corporation's nonresident directors did not violate due process despite Iowa's lack of a director consent statute). Thus, a district court can exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation.[4]

This case is further distinguishable from *Shaffer*, as here there is statutory support for allowing a district court to exercise personal jurisdiction over a nonresident officer or director. NRS 78.135(1) authorizes lawsuits ''against the officers or directors of the corporation for violation of their authority.''[5]

[Headnotes 15-17]

Statutory interpretation is a question of law that we review de novo. *Sims v. Dist. Ct.*, 125 Nev. 126, 129-30, 206 P.3d 980, 982 (2009). When a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction. *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004).

NRS 78.135(1) not only authorizes suits, but also provides notice to officers and directors that they are subject to derivative suits

---

[4]We note that after the district court determines that an officer or director directly harmed a Nevada corporation, it must also determine whether it is reasonable to exercise personal jurisdiction. *Trump*, 109 Nev. at 701, 857 P.2d at 749.

[5]NRS 78.135(1) states in its entirety:

> The statement in the articles of incorporation of the objects, purposes, powers and authorized business of the corporation constitutes, as between the corporation and its directors, officers or stockholders, an authorization to the directors and a limitation upon the actual authority of the representatives of the corporation. Such limitations may be asserted in a proceeding by a stockholder or the State to enjoin the doing or continuation of unauthorized business by the corporation or its officers, or both, in cases where third parties have not acquired rights thereby, or to dissolve the corporation, or in a proceeding by the corporation or by the stockholders suing in a representative suit against the officers or directors of the corporation for violation of their authority.

for violation of their authority.[6] By providing this notice, NRS 78.135(1) provides an officer or director the understanding that by violating their authority as a Nevada corporation's officer or director, they are subject to an action under Nevada's laws in Nevada. Thus, NRS 78.135(1) not only authorizes lawsuits against officers and directors for violating their authority, but it supports a district court's authority to exercise personal jurisdiction over officers and directors in such lawsuits.[7] Therefore, unlike *Shaffer*, there is statutory authority here to support a district court's exercise of personal jurisdiction over nonresident officers and directors.

The district court held hearings based on the motions to dismiss where it granted the motions, stating that an individual's position as a Nevada corporation's director does not automatically subject that individual to jurisdiction in Nevada. While we agree with this statement, the district court needed to conduct further factual analysis in order to determine whether the respondents' conduct subjected them to jurisdiction in Nevada. On remand, the district court must conduct further factual analysis in order to determine whether it can exercise personal jurisdiction over the respondents.

CONCLUSION

A district court can exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation. In light of this opinion, the district court must further analyze the respondents' conduct and contacts with Nevada. Accordingly, we vacate the district court order and remand this matter for further proceedings.

CHERRY, C.J., and DOUGLAS, SAITTA, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

---

[6]NRS 78.135(1) notes that ''[t]he statement in the articles of incorporation of the objects, purposes, powers and authorized business of the corporation constitutes'' a corporate director's authority. A corporation's bylaws and a state's laws also establish a director's authority. 18B Am. Jur. 2d *Corporations* § 1289 (2004). A corporate officer's or agent's authority is established by a corporation's board of directors. *Id.* § 1316. However, the authority may not include acts that a state's laws or a corporation's articles of incorporation or bylaws forbid. *Id.*; *see* NRS 78.135(1) (noting that the articles of incorporation acts as a limitation on the actual authority of a corporation's representative).

[7]The Delaware Legislature has enacted a director consent statute, which states that when a nonresident accepts election or appointment as a director, trustee, or member of a governing body of a corporation, the nonresident consents to jurisdiction in Delaware in an action for a violation of his or her duty in such capacity. Del. Code Ann. tit. 10, § 3114 (Supp. 2010). Although we conclude that NRS 78.135(1) supports a district court's exercise of personal jurisdiction over officers and directors who violate their authority, we note that our Legislature would need to modify NRS 78.135(1) in order for it to have the same scope as Delaware's director consent statute.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO J.D.N., Q.E.T., G.M.T., D.A.T., J.L.T., AND J.F.T., MINORS.

QUIANA M. B.; AND ARTHUR L. T., APPELLANTS, *v.* STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES, RESPONDENT.

No. 57746

August 30, 2012 283 P.3d 842

Appeals by natural parents from a district court order terminating their parental rights as to the minor children. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

Department of Family Services (DFS) petitioned to terminate parental rights of mother and father. The district court granted petition. Parents appealed. The supreme court, GIBBONS, J., held that: (1) any error in admitting into evidence in termination of parental rights proceeding the file containing the entire juvenile court record was harmless, (2) burden of proof for a parent attempting to rebut presumptions in a termination of parental rights proceeding was a preponderance of the evidence, (3) district court considered factors in statute regarding specific considerations in a termination of parental rights proceeding where child was not in physical custody of parent, (4) substantial evidence supported the district court's finding that parental fault existed based on token efforts to care for children, and (5) substantial evidence supported district court's finding that termination of parental rights was in the best interests of children.

Affirmed.

David M. Schieck, Special Public Defender, and *Melissa Elaine Oliver*, Deputy Special Public Defender, Clark County, for Appellant Quiana M. B.

Mills & Mills Law Group and *Gregory S. Mills* and *Daniel W. Anderson*, Las Vegas, for Appellant Arthur L. T.

Steven B. Wolfson, District Attorney, and *Ronald L. Cordes* and *Jennifer I. Kuhlman*, Deputy District Attorneys, Clark County, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's determination regarding the admissibility of evidence for an abuse of discretion.
2. TRIAL.
   The party opposing evidence's admission must object to the specific parts of the evidence that are inadmissible.

3. Appeal and Error.
   When a party fails to make a specific objection to evidence before the district court, the party fails to preserve the issue for appeal.
4. Infants.
   Father failed to preserve for appeal from termination of his parental rights argument that the district court erred in admitting into evidence file containing the entire juvenile court record because the file contained hearsay, where father objected at trial to the entire file on the basis of hearsay, but did not specifically state which portions of the file were inadmissible as hearsay. NRS 47.040(1).
5. Infants.
   The file containing the entire juvenile court record from a child abuse and neglect petition does not automatically form part of the family division of the district court record during a termination of parental rights proceeding.
6. Infants.
   Because the file containing the entire juvenile court record from a child abuse and neglect petition does not automatically form part of the family division of the district court record in a termination of parental rights case, the file is only admissible if it complies with Nevada's statutes and rules of evidence, including the hearsay rule and any hearsay exception.
7. Infants.
   Any error in admitting into evidence in termination of parental rights proceeding the file containing the entire juvenile court record from a child abuse and neglect petition was harmless; substantial evidence beyond the inadmissible portions of the file, if any, supported the family division of the district court's finding that parental fault existed and that the termination of parental rights would serve the children's best interests.
8. Infants.
   A party petitioning to terminate parental rights must establish by clear and convincing evidence that termination is in the children's best interests and that parental fault exists. NRS 128.090(2), 128.105.
9. Appeal and Error.
   The supreme court reviews purely legal questions de novo.
10. Infants.
    The burden of proof for a parent attempting to rebut presumptions in a termination of parental rights proceeding is a preponderance of the evidence. NRS 47.180, 128.109.
11. Infants.
    Due to the fundamental liberty interest in the parent-child relationship that is at stake in a termination of parental rights proceeding, a party seeking to terminate parental rights must prove the petition by clear and convincing evidence.
12. Infants.
    When reviewing an order of the family division of the district court terminating parental rights, the supreme court closely scrutinizes the order to determine if substantial evidence supports the district court's factual findings; however, the supreme court will not substitute its own judgment for that of the district court.
13. Infants.
    Once the presumption applies that termination of parental rights is in the best interest of the child, the parent has the burden to offer evidence to overcome the presumption. NRS 128.107, 128.109.

14. INFANTS.

Although the district court order terminating parental rights did not explicitly refer to factors in statute regarding specific considerations in a termination of parental rights proceeding where child was not in physical custody of parent, the court considered the factors; at the termination proceeding, the district court heard evidence regarding the services that Department of Family Services (DFS) had provided to parents, the children's needs, the efforts that parents had made to reunite with the children, and whether additional services would bring about any change in parents, and in light of the evidence, the court found that parents had not made sufficient efforts to reunite with their children and that neither parent was capable of raising all six children, even with the help of continued services. NRS 128.107, 128.109.

15. INFANTS.

As the consideration of factors in statute regarding specific considerations in a termination of parental rights proceeding where child is not in physical custody of parent is mandatory, it must be clear from the termination order that the family division of the district court applied the factors. NRS 128.107.

16. INFANTS.

Substantial evidence supported the district court's finding that parental fault existed, warranting termination of parental rights, based on token efforts to care for children; mother failed to meaningfully participate in any of the bonding or counseling sessions offered to her, and father failed to take any initiative in raising the children and deferred to his own mother regarding the care of the children. NRS 128.105(2)(f).

17. INFANTS.

Substantial evidence supported district court's finding that termination of parental rights was in the best interests of the children; by the time of the termination proceeding, the children had been living outside of the home for more than three years, mother indicated that she had been unable to secure stable housing or employment for more than a short period of time, mother failed to demonstrate any appreciation for what had gone on with her children since their removal from her home, and, when father was granted an unsupervised visit with mother and children, he committed domestic violence against mother twice in front of the children. NRS 128.005(2)(c), 128.109(2).

18. INFANTS.

As the family division of the district court is in a better position to weigh the credibility of witnesses in a proceeding to terminate parental rights, the supreme court will not substitute its judgment for that of the district court.

Before DOUGLAS, GIBBONS and PARRAGUIRRE, JJ.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we address several issues relating to a termination-of-parental-rights proceeding. First, we determine whether an objection to the admission of the entire juvenile file

(''J'' file) as hearsay preserved the issue for appeal.[1] Next, we consider the applicable burden of proof imposed upon a parent in order to rebut the parental-fault and child's-best-interest presumptions contained in NRS 128.109. Finally, we decide whether substantial evidence supports the family division of the district court's order terminating appellants Quiana M. B.'s and Arthur L. T.'s parental rights.

We conclude that (1) Arthur waived his hearsay arguments regarding the ''J'' file by failing to lodge objections at trial to the specific portions of the ''J'' file he believed contained hearsay; (2) after it is determined that a presumption under NRS 128.109 applies, a parent can rebut that presumption by a preponderance of the evidence; and (3) substantial evidence supports the family division of the district court's order terminating Quiana's and Arthur's parental rights.

FACTS AND PROCEDURAL HISTORY

Quiana is the biological mother of six minor children. Arthur is the biological father of all of the children except J.D.N.[2]

On May 13, 2007, the Las Vegas Metropolitan Police Department (LVMPD) and a specialist from respondent State of Nevada Department of Family Services (DFS) responded to reports that Quiana had physically disciplined two of her children, G.M.T. and D.A.T., with a belt for soiling themselves. During their investigation, the LVMPD and the DFS specialist discovered marks and bruises on G.M.T. and D.A.T. consistent with the design of a belt. Quiana admitted to whipping the children with a belt when they soiled themselves during potty training. Based on these findings, the LVMPD arrested Quiana for child abuse and the DFS specialist placed all six children in protective custody. After conducting a background check and home visit, DFS placed the children in the care of Quiana's mother. During this time, Arthur was in prison for drug-related charges and was not set to be released until August 2009.

Following DFS's filing of an NRS Chapter 432B child abuse and neglect petition in the juvenile division of the district court, the

---

[1]The term ''J'' file is used to refer to all of the documents filed with the juvenile division of the district court in an underlying NRS Chapter 432B proceeding, including the case plan and the Department of Family Service's semiannual reports indicating the parents' and children's progress under the case plan.

[2]The family division of the district court also terminated the parental rights of J.D.N.'s putative father in the order being appealed in this matter. However, J.D.N.'s putative father did not file an appeal. Any discussion of Arthur's parental rights is limited to the five remaining minor children.

court found that it would be contrary to the children's welfare to reside with Quiana. Accordingly, the juvenile division of the district court ordered that the children remain in the custody of Quiana's mother under the supervision of DFS. The next day, Quiana pleaded no contest to the child abuse charges brought against her. DFS then filed a case plan for Quiana with the ultimate goal of reunifying Quiana and her children. DFS did not file a case plan for Arthur. From November 2007 to May 2010, DFS filed seven reports with the juvenile division of the district court on a biannual basis updating the court on the family's progress with the case plan.

While Quiana initially demonstrated progress in completing her case plan, DFS's fourth report indicated that Quiana failed to show any further improvement. Quiana failed to provide DFS with proof of employment and failed to demonstrate sufficient housing for her and her children. Quiana also had yet to complete her individual counseling sessions, and her visitation with the children had become inconsistent. Consequently, DFS changed the permanency plan's goal to terminating parental rights, which the juvenile division of the district court approved. In August 2009, DFS petitioned the family division of the district court to terminate Quiana's and Arthur's parental rights.

Prior to the hearing on DFS's petition to terminate parental rights, DFS filed two more reports with the juvenile division of the district court concerning the family's progress. By this time, Arthur had been released from prison. Because Quiana's and Arthur's supervised visitations with their children had been going well, DFS allowed them to have two unsupervised home visits with the children. At the second visit, Arthur choked Quiana on two separate occasions in front of the children. Arthur later pleaded guilty to domestic violence charges and began taking domestic violence classes. Following the incident, DFS recommended that Quiana receive a domestic violence assessment, but Quiana did not begin the domestic violence classes until just before trial due to a scheduling conflict with her visitation days.

On October 7, 2010, the family division of the district court held a hearing on DFS's petition to terminate Quiana's and Arthur's parental rights. DFS called Quiana as its only witness. Quiana testified that she was seeking employment and living with a friend. While Quiana stated that she loved her children, she also expressed no concern over the children being around Arthur following the domestic violence incident and was unsure as to why all the children were in therapy.

Because the children were removed from their home pursuant to NRS Chapter 432B and had resided outside of the home for at least 14 of 20 consecutive months, the family division of the district court applied NRS 128.109(1)(a)'s presumption that Quiana

and Arthur had demonstrated only token efforts to care for the children, and NRS 128.109(2)'s presumption that the best interest of the children would be served by the termination of Quiana's and Arthur's parental rights. The family division of the district court further found that pursuant to NRS 128.109(1)(b), Quiana's and Arthur's failure to substantially comply with the terms and conditions of the reunification plan within six months of the date the case plan commenced was evidence of a failure of parental adjustment. Thus, the family division of the district court allowed Quiana and Arthur to present evidence that would rebut these presumptions. The family division of the district court heard testimony from two DFS specialists, Arthur, and Quiana's counselor. During the termination proceeding, the family division of the district court also admitted the entire juvenile court record (''J'' file) into evidence over Arthur's general hearsay objections.

Following the hearing, the family division of the district court granted DFS's petition. The family division of the district court found that neither Quiana nor Arthur rebutted NRS 128.109's presumptions. However, the family division of the district court did not articulate the burden of proof required for Quiana and Arthur to rebut those presumptions. The family division of the district court also did not expressly refer to NRS 128.107, which sets forth certain factors that a court must consider before terminating parental rights when children are not in the physical custody of a parent. The family division of the district court then determined that clear and convincing evidence established that parental fault existed in that Quiana and Arthur demonstrated only token efforts to care for the children, and that they failed to substantially comply with the plan to reunite the family, evidencing a failure of parental adjustment. Specifically, the family division of the district court found that Quiana failed to demonstrate any appreciation as to what had occurred in the children's lives over the past several years and only began to actively participate in counseling as the termination hearing approached. The family division of the district court further determined that Arthur had failed to show any initiative in caring for the children and only had done what his mother had asked him to do with regard to the children. Lastly, the family division of the district court concluded that the termination of Quiana's and Arthur's parental rights was in the children's best interests. In reaching this conclusion, the family division of the district court found that while the parents and children loved each other, neither parent was prepared to take care of all six children and prolonging the termination process would only cause more harm to the children.

Both Quiana and Arthur now appeal this decision. Arthur argues that (1) the family division of the district court improperly admitted the entire ''J'' file even though it contained hearsay and dou-

ble hearsay statements, (2) the family division of the district court failed to consider the factors contained in NRS 128.106 through NRS 128.108, and (3) substantial evidence does not support the family division of the district court's order terminating his parental rights.[3] Quiana contends that (1) a parent may rebut NRS 128.109's presumptions by a mere preponderance of the evidence; (2) the family division of the district court failed to consider NRS 128.107(4) before terminating her parental rights; and (3) because she rebutted the presumptions by a preponderance of the evidence, substantial evidence does not support the family division of the district court's decision to terminate her parental rights.

DISCUSSION

Arthur waived his hearsay arguments regarding the ''J'' file by failing to state a proper objection

Arthur argues that the family division of the district court abused its discretion by admitting the entire ''J'' file because the ''J'' file contains hearsay. DFS responds that the ''J'' file cannot be excluded as evidence based on a hearsay objection because the ''J'' file already constitutes part of the family division of the district court record. DFS further asserts that Arthur failed to preserve this issue for appeal because Arthur did not specifically state which portions of the ''J'' file constitute hearsay.

[Headnotes 1-3]

We review a district court's determination regarding the admissibility of evidence for an abuse of discretion. *Matter of Parental Rights as to N.J.*, 116 Nev. 790, 804, 8 P.3d 126, 135 (2000). When objecting to the admission of evidence, a party must state the specific grounds for the objection. NRS 47.040(1)(a). This specificity requirement applies not only to the grounds for objection, but also to the particular part of the evidence being offered for admission. 1 George E. Dix et al., *McCormick on Evidence* § 52 (Kenneth S. Broun ed., 6th ed. 2006). For example, a party may seek to introduce evidence that consists of several statements, some of which are subject to an objection, others which are not. *Id.* In such a case, it is the responsibility of the party opposing the evidence's admission to object to the specific parts of the evidence that are inadmissible. *Id.* Thus, when a party fails to make a specific objection before the district court, the party fails to preserve the issue for appeal. *Thomas v. Hardwick*, 126 Nev. 142, 156, 231 P.3d 1111, 1120 (2010).

---

[3]During oral argument, DFS requested that this court take judicial notice of facts pertaining to Arthur that occurred after the family division of the district court's order terminating Quiana's and Arthur's parental rights. Given that NRAP 27(a)(1) requires such requests to be made by a written motion, we deny DFS's request.

[Headnote 4]

We conclude that Arthur failed to properly object to the admission of the ''J'' file. Arthur objected to the entire ''J'' file on the basis of hearsay, but never specifically stated what portions or documents of the ''J'' file were inadmissible as hearsay. Without a more specific objection, it is impossible for the family division of the district court to make a proper ruling because it is unclear what evidentiary question is at issue. *See id.* (stating that a proper objection pursuant to NRS 47.040(1) serves to educate both the trial court and the opposing party). By failing to lodge a proper objection to specific portions of the ''J'' file allegedly containing hearsay, Arthur waived his hearsay arguments pertaining to the ''J'' file.[4]

Nevertheless, given the seriousness of the rights at issue in a termination-of-parental-rights case, we believe that it is appropriate for us to review this issue for plain error. NRS 47.040(2); *see Lioce v. Cohen*, 124 Nev. 1, 19, 173 P.3d 970, 981-82 (2008) (recognizing that this court may review unobjected-to attorney misconduct for plain error on appeal relating to a motion for new trial); *see also Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (''The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established.''); 5 Am. Jur. 2d *Appellate Review* § 720 (2007) (''Relief under the plain error standard is rarely granted in civil cases and is reserved for those situations where it has been demonstrated that the failure to grant relief will result in a manifest injustice or a miscarriage of justice.'' (footnotes omitted)).

[Headnote 5]

DFS relies upon our decision in *Matter of Parental Rights as to N.D.O.* to assert that the ''J'' file cannot be excluded as evidence based on a hearsay objection because the ''J'' file already constitutes part of the family division of the district court record. *See* 121 Nev. 379, 115 P.3d 223 (2005). We disagree. *Matter of Parental Rights as to N.D.O.* related to whether due process mandates the appointment of counsel for a parent during a termination-of-parental-rights proceeding. 121 Nev. at 382-83, 115 P.3d at 225. In reaching its conclusion, this court evaluated the risk of an erroneous decision if the appellant had not received counsel during the termination proceeding. *Id.* at 384-86, 115 P.3d at 226-27. While the appellant pointed out that her attorney had not ob-

---

[4]Arthur further argues that the family division of the district court abused its discretion in admitting the ''J'' file because DFS failed to authenticate the ''J'' file. However, Arthur also waived this argument because he did not raise it before the family division of the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (''A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'').

jected to hearsay statements included in testimony by DFS workers, this court determined that these statements were already part of the record because they appeared in DFS's reports that it submitted to the juvenile division of the district court. *Id.* at 384-85, 115 P.3d at 226-27. However, this conclusion does not mean that the ''J'' file always forms part of the family division of the district court record in a termination proceeding. Instead, the ''J'' file is part of DFS's file. DFS submits the various documents and semi-annual reports that make up the ''J'' file with the juvenile division of the district court as part of an NRS Chapter 432B proceeding. Thus, DFS submits the documents of the ''J'' file to a separate court in a separate proceeding. As a result, the entire ''J'' file does not already form part of the family division of the district court record during a termination-of-parental-rights proceeding.

[Headnote 6]

Because the entire ''J'' file does not automatically form part of the family division of the district court record, the ''J'' file is only admissible if it complies with Nevada's statutes and rules of evidence, including the hearsay rule and any hearsay exception. In light of this requirement, we note that the family division of the district court may admit the entire ''J'' file subject to specific objections lodged by either party. Here, the family division of the district court admitted the entire ''J'' file into evidence without considering any further, specific objections. NRS 128.090(3) also provides that ''[i]nformation contained in a report filed pursuant to NRS 432.0999 to 432.130, inclusive, or chapter 432B of NRS may not be excluded from the proceeding by the invoking of any privilege.'' Thus, NRS 128.090(3) expressly allows the family division of the district court to admit reports from an NRS Chapter 432B proceeding contained in a ''J'' file without complying with Nevada's privilege requirements. However, NRS 128.090(3) does not extend this exception beyond privileges, and the ''J'' file still must comply with the rest of Nevada's statutes and rules on evidence, including the hearsay rule.

[Headnote 7]

During Quiana's and Arthur's termination proceeding, the family division of the district court admitted the ''J'' file in its entirety. Despite this admission of the entire ''J'' file, we conclude, as discussed below, substantial evidence beyond the inadmissible portions of the ''J'' file, if any, supports the family division of the district court's finding that parental fault exists and that the termination of Quiana's and Arthur's parental rights would serve the children's best interests. *McMonigle v. McMonigle*, 110 Nev. 1407, 1409, 887 P.2d 742, 744 (1994) (presuming district court disregarded improper evidence when there is other substantial evidence upon which the court based its findings). Thus, the family division

of the district court's admission of the entire ''J'' file did not result in a manifest injustice that would constitute plain error.

The applicable burden of proof to rebut NRS 128.109's presumptions is a preponderance of the evidence

[Headnotes 8, 9]

A party petitioning to terminate parental rights must establish by clear and convincing evidence that termination is in the children's best interests and that parental fault exists. *In re Parental Rights as to N.J.*, 125 Nev. 835, 843, 221 P.3d 1255, 1261 (2009); NRS 128.090(2); *see* NRS 128.105. On appeal, we review purely legal questions de novo. *Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011). Determining the appropriate burden of proof to rebut NRS 128.109's presumptions is a question of law subject to de novo review.

Quiana argues that she rebutted NRS 128.109's presumptions by a preponderance of the evidence. Quiana points out that NRS 128.090(2) only raises the burden of proof for petitioners in cases involving the termination of parental rights, and otherwise, states that termination proceedings are civil in nature. Therefore, Quiana contends that NRS 47.180 applies and only requires a party to a civil case to rebut a presumption by a preponderance of the evidence. However, DFS interprets NRS 128.090(2) as requiring both the petitioner and the parents in a termination proceeding to satisfy a clear and convincing burden of proof.

The family division of the district court did not articulate the burden of proof it relied upon when determining that Quiana and Arthur failed to rebut NRS 128.109's presumptions. We conclude that the proper burden of proof required for a parent to rebut NRS 128.109's presumptions is a preponderance of the evidence, and that Quiana and Arthur failed to meet this burden.

NRS 128.109 sets forth presumptions that the family division of the district court must apply in certain termination proceedings. However, the statute is silent with regard to the burden of proof necessary to rebut these presumptions. While NRS 128.109 does not address the appropriate burden of proof for rebuttal, NRS 128.090(2) explains that termination-of-parental-rights cases are civil in nature. We have previously stated that in civil matters, presumptions can be rebutted by a preponderance of the evidence. NRS 47.180(1);[5] *see Construction Indus. v. Chalue*, 119 Nev. 348, 353, 74 P.3d 595, 598 (2003) (requiring a workers' compensation claimant to rebut the presumption that a controlled sub-

[5]NRS 47.180(1) states, ''A presumption, other than a presumption against the accused in a criminal action, imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.''

stance caused his work-related injuries by a preponderance of the evidence).

[Headnotes 10, 11]

While DFS admits that NRS 47.180 applies to civil cases in general, DFS asserts that NRS 128.090(2) creates an exception to NRS 47.180 by raising the burden of proof in termination proceedings to clear and convincing evidence for both the petitioner and a parent. Specifically, DFS relies upon NRS 128.090(2)'s language that a court ''shall in all cases require the petitioner to establish the facts by clear and convincing evidence and shall give full and careful consideration to all of the evidence presented, with regard to the rights and claims of the parent of the child.'' We agree that NRS 128.090 clearly requires the petitioner, the party moving to terminate parental rights, to satisfy a clear and convincing burden of proof. *See In re Parental Rights as to C.C.A.*, 128 Nev. 166, 169, 273 P.3d 852, 854 (2012) (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982)). However, we disagree with DFS that NRS 128.090's language also raises the burden of proof for a parent attempting to rebut a presumption set forth in NRS 128.109. Because NRS 128.109 is silent on the appropriate burden of proof for rebutting its presumptions and a termination proceeding is civil in nature, we conclude that NRS 48.170 applies, and thus, the burden of proof for a parent attempting to rebut an NRS 128.109 presumption is a preponderance of the evidence.

This conclusion is also consistent with the constitutional concerns that are implicated during termination proceedings. *See Matter of Parental Rights as to D.R.H.*, 120 Nev. 422, 426-27, 92 P.3d 1230, 1233 (2004) (stating that parental termination proceedings involve a parent's fundamental right to raise his or her child). While we recognize that NRS 128.109's presumptions promote DFS's compelling interest of providing a safe and stable environment for abused and neglected children, we also recognize that the parent-child relationship is a fundamental liberty interest. *See id.* Due to this fundamental liberty interest, a party seeking to terminate parental rights must prove its petition by clear and convincing evidence. *See In re Parental Rights as to C.C.A.*, 128 Nev. at 169, 273 P.3d at 854. The United States Supreme Court has explained that this higher burden of proof is necessary in order to adequately convey to a fact-finder that the risk of erroneously terminating parental rights must be lower than the risk of erroneously failing to terminate them. *Santosky*, 455 U.S. at 765-66. If we were to adopt DFS's theory that a parent must rebut NRS 128.109's presumptions by clear and convincing evidence, the risk to a petitioner and parent in a termination proceeding would be equally allotted. *See In re Interest of Kyle S.-G.*, 533 N.W.2d 794, 797-99 (Wis. 1995) (rejecting argument that a parent must rebut a

presumption in a termination proceeding by clear and convincing evidence as being contrary to the allocation of risk between a parent and a petitioner seeking to terminate parental rights). Therefore, we cannot agree with DFS that a parent must rebut NRS 128.109's presumptions by clear and convincing evidence.

Other states addressing this issue have reached a similar conclusion. *See, e.g.*, *Interest of L.D.B.*, 891 P.2d 468, 471 (Kan. Ct. App. 1995) (holding that a parent must rebut a presumption of parental unfitness during a termination proceeding by a preponderance of the evidence); *In re Interest of Kyle S.-G.*, 533 N.W.2d at 797 (concluding that a parent must rebut a presumption of abandonment by a preponderance of evidence during a termination proceeding); *cf. In re A.M.*, 831 N.E.2d 648, 653-55 (Ill. App. Ct. 2005) (determining a parent must rebut a presumption in a termination proceeding by introducing sufficient evidence to the contrary of the presumption); *In re Welfare of J.W.*, 807 N.W.2d 441, 445-46 (Minn. Ct. App. 2011) (requiring a parent to rebut a presumption in a termination proceeding by presenting evidence '' 'that would justify a finding of fact contrary to the assumed fact' '' (quoting Minn. R. Evid. 301)). Based on our review of the pertinent statutes, we conclude that Nevada law requires a parent to rebut NRS 128.109's presumptions by a preponderance of the evidence.[6]

The family division of the district court considered the appropriate factors and its order terminating Quiana's and Arthur's parental rights is supported by substantial evidence

[Headnote 12]

Having determined the appropriate burdens of proof, we now turn to Quiana's and Arthur's arguments regarding whether the family division of the district court properly considered the relevant factors in determining if their parental rights should be terminated and whether substantial evidence supports the order terminating their parental rights. When reviewing a family division of the district court's order terminating parental rights, we closely scrutinize the order to determine if substantial evidence supports the district court's factual findings. *Matter of Parental Rights as to A.J.G.*,

---

[6]We also note that this conclusion is distinguishable from our general statement in *Rivera v. Philip Morris, Inc.*, that the burden of persuasion remains with one party throughout a case. 125 Nev. 185, 191, 209 P.3d 271, 275 (2009). *Rivera* involved the applicability of a heeding presumption in a strict product liability failure-to-warn case. *Id.* at 187, 209 P.3d at 272. In this case, we are discussing specific statutes, NRS 128.090 and NRS 128.109, relating to the unique context of proceedings to terminate parental rights. Therefore, our conclusion here applies in cases involving the termination of parental rights and does not affect our decisions in other contexts involving the rebuttal of a presumption.

122 Nev. 1418, 1423, 148 P.3d 759, 763 (2006). However, we will not substitute our own judgment for that of the district court. *Id.*

The family division of the district court properly considered NRS 128.107

[Headnote 13]

Where a child is not in the parent's physical custody in a parental rights termination case, NRS 128.107 contains specific factors that the family division of the district court must consider before terminating parental rights. When the petitioner has demonstrated that NRS 128.109's presumptions apply, the burden to present evidence regarding NRS 128.107's factors lies with the parent. *See Matter of Parental Rights as to A.J.G.*, 122 Nev. at 1426, 148 P.3d at 765.

[Headnotes 14, 15]

After the family division of the district court determined that NRS 128.109's presumptions applied, Quiana and Arthur bore the burden of presenting evidence relating to NRS 128.107's factors that would help rebut those presumptions. The family division of the district court did not expressly refer to NRS 128.107 in its order terminating Quiana's and Arthur's parental rights. As the consideration of NRS 128.107's factors is mandatory, it must be clear from the termination order that the family division of the district court applied NRS 128.107's factors. Here, the family division of the district court did not explicitly refer to NRS 128.107, but the order demonstrates that the court applied the required NRS 128.107 factors when finding that Quiana and Arthur failed to rebut NRS 128.109's presumptions. At the termination proceeding, the family division of the district court heard evidence regarding the services that DFS had provided to Quiana and Arthur, the children's needs, the efforts that Quiana and Arthur had made to reunite with the children, and whether additional services would bring about any change in Quiana and Arthur. *See* NRS 128.107. In light of this evidence, the family division of the district court found that Quiana and Arthur had not made sufficient efforts to reunite with their children. The family division of the district court also was not convinced that either Quiana or Arthur were capable of raising all six children, even with the help of continued services. Thus, the family division of the district court properly considered NRS 128.107's factors when determining that Quiana and Arthur failed to rebut NRS 128.109's presumptions.[7]

---

[7]Arthur further argues that the family division of the district court erred by failing to consider the factors contained in NRS 128.106 and NRS 128.108. We disagree. NRS 128.106 does not apply because the family division of the district court did not make a finding of parental fault based on neglect or unfitness. *See* NRS 128.106 (requiring a district court to consider certain factors

Substantial evidence supports the family division of the district court's finding that parental fault existed based on token efforts

Based on the time that the children had resided outside of the home, the family division of the district court also applied NRS 128.109(1)(a)'s presumption of parental fault based on token efforts. Parental fault exists if a parent engages in only token efforts to care for a child. NRS 128.105(2)(f). A petitioner must demonstrate that a parent has only made token efforts ''(1) [t]o support or communicate with the child; (2) [t]o prevent neglect of the child; (3) [t]o avoid being an unfit parent; or (4) [t]o eliminate the risk of serious physical, mental or emotional injury to the child.'' *Id*.

[Headnote 16]

The family division of the district court found that the evidence presented by Quiana and Arthur was insufficient to overcome the presumption of parental fault based on token efforts. At the conclusion of the trial, the family division of the district court expressed its uncertainty as to whether Quiana had addressed the issues that had caused her to whip her two children in the first place. In the order terminating Quiana's parental rights, the family division of the district court further stated that Quiana made only token efforts to care for her children, which were too little too late, as she did not meaningfully participate in any of the bonding or counseling sessions until 2010. Indeed, the appellate record shows that DFS removed the children from Quiana's care in May 2007 and Quiana was required to attend parenting classes and anger management classes. While Quiana initially complied with these case plan objectives, Quiana never completed all of the required individual anger management sessions. In September 2009, Quiana reinitiated attempts to complete her required counseling by attending a parent-bonding group and individual therapy. However, Quiana was uncooperative and resistant during these sessions. According to the testimony of Quiana's counselor, Quiana only began to actively participate in January 2010, shortly before trial.

The family division of the district court further found that Arthur had made only token efforts to care for his children that were, likewise, too little too late. The family division of the district court recognized that Arthur had made some efforts to support the children, but also determined that Arthur failed to take any initia-

---

before making a finding of parental fault based on neglect or unfitness). NRS 128.108 also does not apply because DFS did not petition to terminate the parental rights of Quiana and Arthur with the ultimate goal of having the foster parents adopt the children. *See* NRS 128.108 (requiring a district court to consider certain factors when a child resides in a foster home and the ultimate goal of the termination process is to have the foster parents adopt the child).

tive in raising the children and deferred to his mother regarding the care of the children. The appellate record supports these findings as well. During Arthur's testimony, Arthur explained how one of his children had lived with him and his mother following his release from prison. Arthur stated that when his mother asked him to help care for the child, he did so. Arthur also explained that if his mother was to receive custody of all the children, he would do anything that she asked him to do in order to help care for the children. Thus, most of Arthur's statements regarding the care of his children related back to his mother. Furthermore, Arthur failed to actively participate in his domestic violence classes following the choking incident with Quiana. While Arthur attended the domestic violence classes, he received poor evaluations regarding his participation in these classes. Therefore, we conclude that Quiana and Arthur failed to rebut the presumption of token efforts and that substantial evidence supports the family division of the district court's finding that parental fault existed.

Substantial evidence supports the family division of the district court's finding that termination of parental rights was in the children's best interests

[Headnote 17]

In determining whether the termination of parental rights is in a child's best interest, the Legislature has recognized that a child's continuing need for proper physical, mental, and emotional growth and development are relevant considerations. *Matter of Parental Rights as to D.R.H.*, 120 Nev. at 433, 92 P.3d at 1237 (quoting NRS 128.005(2)(c)).

Due to the time period that the children had been removed from the home, the family division of the district court applied NRS 128.109(2)'s presumption that termination would serve the children's best interests. At the conclusion of the trial, the family division of the district court determined that neither parent had rebutted the presumption that termination would be in the best interests of the children. The family division of the district court found that neither Quiana nor Arthur was prepared to receive custody of all six children. The family division of the district court stated that DFS was raising the children instead of the parents. While the family division of the district court believed that Quiana and Arthur eventually would be able to apply the lessons they were learning from services, the court also found that the longer the process was delayed, the more harmful it would be to the children.

[Headnote 18]

The appellate record supports these findings. By the time of the termination proceeding, the children had been living outside of the home for more than three years. Since the children's removal from

the home, Quiana's testimony indicated that she had been unable to secure stable housing or employment for more than a short period of time. Although Quiana's counselor testified that Quiana and the children were very bonded and that termination would not be in the children's best interests, the counselor also admitted that it would be very difficult for Quiana to receive custody of all six children at once. Instead, the counselor suggested that Quiana should receive custody of the children one at a time over a year with the help of continued services. Ultimately, the family division of the district court did not give much weight to the testimony of Quiana's counselor. As the family division of the district court is in a better position to weigh the credibility of witnesses, we will not substitute our judgment for that of the district court. *See Matter of Parental Rights as to C.J.M.*, 118 Nev. 724, 732, 58 P.3d 188, 194 (2002) (recognizing that a district court is in the best position to observe the demeanor of parties and assess their credibility).

The family division of the district court also found that Quiana's testimony was so evasive and her recollection so faulty that she failed to demonstrate any appreciation for what had gone on with her children since their removal from her home back in 2007. During her testimony, Quiana expressed uncertainty as to why her children were in need of therapy. Quiana testified that she had no concerns about Arthur being around the children, even though Arthur had recently committed domestic violence against Quiana in front of the children. Quiana also stated that she was unsure as to how much more time she would need before she would be able to care for the children on her own. Given this testimony and the fact that the family division of the district court is in a better position to observe the parties, we again will not substitute the court's judgment with our own.

The record also supports the family division of the district court's finding that Arthur was not prepared to receive custody of his children. During trial, Arthur testified regarding the time that one of his children had lived with him and his mother. However, Arthur stated that as soon as his mother was unable to care for the child, DFS removed the child from the home. Furthermore, when DFS granted Arthur an unsupervised visit with Quiana and the children, Arthur committed domestic violence against Quiana twice in front of the children. Therefore, substantial evidence supports the family division of the district court's finding that the termination of Quiana's and Arthur's parental rights would serve the children's best interests.[8]

---

[8]Quiana and Arthur also contend that substantial evidence does not support the family division of the district court's finding of parental fault based on a failure of parental adjustment. However, because we determine that substantial

In light of the foregoing, we affirm the family division of the district court's order terminating Quiana's and Arthur's parental rights.

DOUGLAS and PARRAGUIRRE, JJ., concur.

SIERRA NEVADA ADMINISTRATORS, APPELLANT, *v.* ASEN NEGRIEV, RESPONDENT.

No. 57645

September 13, 2012 285 P.3d 1056

Appeal from a district court order denying a petition for judicial review in a workers' compensation action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Claimant filed workers' compensation claim. Employer's workers' compensation carrier accepted claimant's claim but refused to include claimant's tip income in its calculation of his average monthly wage because claimant had not paid taxes on these tips. The hearing officer affirmed carrier's average monthly wage calculation, and claimant appealed. The Department of Administration appeals officer reversed the hearing officer's decision, and carrier appealed. The district court denied carrier's petition for judicial review, and appeal was taken. The supreme court, GIBBONS, J., held that: (1) workers' compensation law requires a workers' compensation carrier to include tip income in an employee's average monthly wage calculation if the employee reported the tip income to his or her employer; and (2) since claimant regularly reported his tip income to employer at the end of each of his shifts, he was entitled to receive an average monthly wage calculation based on both his hourly wage and his tip income.

Affirmed.

Black & LoBello and *Michael J. Ryan*, Las Vegas, for Appellant.

The Law Office of Daniel S. Simon and *Daniel S. Simon*, Las Vegas, for Respondent.

---

evidence supports the family division of the district court's finding of token efforts, we need not consider further whether substantial evidence supports the court's finding that Quiana and Arthur failed to make parental adjustments. *See* NRS 128.105 (stating that in order to terminate parental rights, a district court must find that termination is in the child's best interest and that at least one parental fault factor exists).

1. WORKERS' COMPENSATION.
   Workers' compensation benefits are typically calculated based on a percentage of the injured employee's average monthly wage. NRS 616C.420; NAC 616C.435(1).
2. ADMINISTRATIVE LAW AND PROCEDURE.
   When reviewing an administrative decision, the supreme court's function is identical to that of the district court.
3. ADMINISTRATIVE LAW AND PROCEDURE.
   While the supreme court will not substitute an agency's judgment with its own regarding a question of fact, the court reviews questions of law de novo.
4. STATUTES.
   Construction of a statute in an administrative matter is a question of law subject to de novo review.
5. STATUTES.
   In interpreting a statute, the court's analysis begins with its text.
6. STATUTES.
   When interpreting a statute, courts construe a plain and unambiguous statute according to its ordinary meaning.
7. WORKERS' COMPENSATION.
   Workers' compensation statute, providing that private carrier shall calculate compensation for an employee on the basis of wages paid by employer plus the amount of tips reported by employee, requires a workers' compensation carrier to include tip income in an employee's average monthly wage calculation if the employee reported the tip income to his or her employer. NRS 616B.227(4).
8. WORKERS' COMPENSATION.
   Whether workers' compensation claimant actually paid taxes on the tip income is irrelevant to the average monthly wage calculation, as long as claimant reported the tips to his or her employer, for purposes of statute providing that private workers' compensation carrier shall calculate compensation for an employee on the basis of wages paid by the employer plus the amount of tips reported by the employee. NRS 616B.227(4).
9. WORKERS' COMPENSATION.
   Since workers' compensation claimant regularly reported his tip income to employer at the end of each of his shifts, he was entitled to receive an average monthly wage calculation based on both his hourly wage and his tip income. NRS 616B.227(4).

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we address whether NRS 616B.227 allows an average monthly wage calculation for workers' compensation benefits to include untaxed tip income that an employee reports to his or her employer. We conclude that NRS 616B.227 requires an average monthly wage calculation to include untaxed tip income when an injured employee reported the tip income to his or her employer. Therefore, we affirm the district court's order denying appellant Sierra Nevada Administrators' petition for judicial review.

FACTS AND PROCEDURAL HISTORY

Respondent Asen Negriev sustained a compensable industrial injury when he slipped and fell, injuring his back, while walking into the kitchen during his shift as a bartender at the Big Inning Sports Pub in Las Vegas. Negriev's compensation at Big Inning included his hourly pay of eight dollars, as well as any tip income he received from his customers. At the end of each of his shifts, Negriev consistently reported any tip income that he had received to Big Inning. Despite these reports, Big Inning did not include Negriev's tip income on his paychecks for tax purposes. Negriev also did not declare his tips as part of his income to the Internal Revenue Service (IRS) when completing his own taxes. Consequently, Negriev did not pay taxes on any of his tip income.

Negriev later filed a workers' compensation claim with Big Inning's workers' compensation carrier, Sierra. Sierra accepted Negriev's claim but refused to include Negriev's tip income in its calculation of his average monthly wage because Negriev had not paid taxes on these tips. This resulted in a lesser amount of workers' compensation benefits for Negriev, and thus, Negriev appealed Sierra's average monthly wage calculation to an administrative hearing officer.

The hearing officer affirmed Sierra's average monthly wage calculation. The officer reasoned that Negriev's average monthly wage calculation should not include his tip income because Negriev's wage history and paychecks did not indicate that he had declared his tips to Big Inning in accordance with NRS 616B.227's requirements.[1]

Negriev appealed the hearing officer's decision to a Nevada Department of Administration appeals officer. In the meantime, Sierra issued Negriev a six-percent permanent partial disability award. Because it was based on Sierra's previous average monthly wage calculation, Negriev appealed this determination as well. Negriev later agreed to consolidate his appeal of his permanent partial disability award with his appeal from Sierra's average monthly wage calculation so that an appeals officer could hear both appeals at the same time.

The appeals officer reversed the hearing officer's decision. The appeals officer found that Negriev had faithfully reported his tips to Big Inning, but Big Inning failed to include the tips on his paychecks or declare the tips to the IRS. Therefore, the appeals officer ordered Sierra to recalculate Negriev's average monthly wage

---

[1]Under NRS 616B.227(4), a workers' compensation carrier must calculate an employee's average monthly wage according to the employee's wages and the amount of tips that the employee reported to his or her employer.

to include his tip income. This resulted in an increase in Negriev's workers' compensation benefits, including Negriev's permanent partial disability award.

Sierra then filed a petition for judicial review in the district court that was denied. This appeal followed.[2]

DISCUSSION

NRS 616B.227 requires an average monthly wage calculation to include untaxed tip income that an employee reports to his or her employer

[Headnote 1]

Workers' compensation benefits are typically calculated based on a percentage of the injured employee's average monthly wage. *City of North Las Vegas v. Warburton*, 127 Nev. 682, 687, 262 P.3d 715, 718 (2011) (citing NAC 616C.435(1) and NRS 616C.420). Sierra argues that, under NRS 616B.227, average monthly wages may include tip income only if the IRS has taxed the tips. Sierra further asserts that interpreting NRS 616B.227 otherwise would provide Negriev with a windfall because he did not pay taxes on his tip income.

[Headnotes 2-4]

When reviewing an administrative decision, this court's function is identical to that of the district court. *SIIS v. Engel*, 114 Nev. 1372, 1374, 971 P.2d 793, 795 (1998). While we will not substitute an agency's judgment with our own regarding a question of fact, we review questions of law de novo. *Id*. The construction of a statute in an administrative matter is a question of law subject to de novo review. *Id*.

[Headnotes 5, 6]

In interpreting a statute, our analysis begins with its text. *In re State Engineer Ruling 5823*, 128 Nev. 232, 239, 277 P.3d 449, 453 (2012). We construe a plain and unambiguous statute according to its ordinary meaning. *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007).

NRS 616B.227(4) provides, in pertinent part, that a ''private carrier . . . shall calculate compensation for an employee on the

---

[2]Negriev also suggests that this appeal is moot because he elected to receive his permanent partial disability award as a lump-sum payment. However, we previously rejected this argument in an order denying Negriev's motion to dismiss this appeal, and therefore, we will not revisit this issue again. *See Dictor v. Creative Management Services*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (''The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case.'').

basis of wages paid by the employer plus the amount of tips reported by the employee.'' NRS 616B.227(1) further requires that an employer make a copy of each report that an employee files regarding his or her tips in order to report this amount to the IRS.[3]

[Headnotes 7-9]

Under a plain reading of the statute, we conclude that NRS 616B.227 requires a workers' compensation carrier to include tip income in an employee's average monthly wage calculation if the employee reported the tip income to his or her employer. Thus, whether an employee actually paid taxes on the tip income is irrelevant to the average monthly wage calculation, as long as the employee reported the tips to his or her employer. Here, the record demonstrates that Negriev regularly reported his tip income to Big Inning at the end of each of his shifts. Thus, under NRS 616B.227, Negriev is entitled to receive an average monthly wage calculation based on both his hourly wage and his tip income. If Negriev had not reported his tip income to his employer, NRS 616B.227 would not require his monthly wage calculation to include his tip income. However, since Negriev did declare his tip income to Big Inning, Sierra must calculate his average monthly wage to include his tips, regardless of whether Negriev actually paid taxes on this tip income.

Sierra claims that such an interpretation of NRS 616B.227 provides Negriev with a windfall since he never paid taxes on the tip income. We disagree because Negriev's tax liability to the federal government remains the same. *See Pizza Hut Delivery v. Blackwell*, 418 S.E.2d 639, 640 (Ga. Ct. App. 1992) (noting that any failure of an employee to pay federal income tax on tips is a matter between the employee, the state, and the federal government and does not prohibit the inclusion of an employee's tips in the average monthly wage calculation for the purpose of determining workers' compensation benefits). Therefore, the district court properly in-

---

[3]NRS 616B.227's relevant provisions fully state:

> 1. Except as otherwise provided in subsection 2, an employer shall:
>
> (a) Make a copy of each report that an employee files with the employer pursuant to 26 U.S.C. § 6053(a) to report the amount of his or her tips to the United States Internal Revenue Service; and
>
> (b) Submit the copy to his or her private carrier upon request and retain another copy for his or her records or, if the employer is self-insured or a member of an association of self-insured public or private employers, retain the copy for his or her records.
>
> . . . .
>
> 4. The private carrier, self-insured employer or association of self-insured public or private employers shall calculate compensation for an employee on the basis of wages paid by the employer plus the amount of tips reported by the employee pursuant to 26 U.S.C. § 6053(a). Reports made after the date of injury may not be used for the calculation of compensation.

terpreted NRS 616B.227 as requiring Sierra to calculate Negriev's average monthly wage to include his reported tip income, and Negriev is entitled to workers' compensation benefits based upon this amount. Accordingly, we affirm the district court's order.

CHERRY, C.J., and DOUGLAS, SAITTA, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

THE STATE OF NEVADA, IN ITS PROPRIETARY CAPACITY AND AS PARENS PATRIAE, BY AND THROUGH ITS ATTORNEY GENERAL; PEGGY MAZE JOHNSON AND LAUNA WILSON, INDIVIDUALLY AND AS CLASS REPRESENTATIVES FOR ALL OTHERS SIMILARLY SITUATED; AND LARRY LANCTO, INDIVIDUALLY AND AS CLASS REPRESENTATIVES FOR ALL OTHERS SIMILARLY SITUATED, APPELLANTS, *v.* RELIANT ENERGY, INC., A TEXAS CORPORATION; RELIANT RESOURCES, INC., A DELAWARE CORPORATION; CENTERPOINT ENERGY, INC., A TEXAS CORPORATION; AND KATHLEEN M. ZANABONI, AN INDIVIDUAL, RESPONDENTS.

No. 55752

September 27, 2012 289 P.3d 1186

Appeal from a district court order dismissing appellants' complaint. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Natural gas consumers and the State, in its proprietary capacity as a direct or indirect purchaser of natural gas and natural gas transportation services, filed claim against natural gas wholesalers, alleging that they violated the state's Unfair Trade Practices Act (UTPA) by conspiring with a now-defunct energy company to drive up the price of natural gas in certain markets in state and neighboring state. Wholesalers filed motion to dismiss on ground of preemption. The district court granted motion. Consumers and State appealed. The supreme court, CHERRY, C.J., held that doctrine of federal field preemption applied to bar the UTPA claim.

Affirmed.

Catherine Cortez Masto, Attorney General, and *Eric P. Witkoski*, Chief Deputy Attorney General, Carson City; *James Tynan Kelly*, Houston, Texas, for Appellants the State of Nevada, Peggy Maze Johnson, and Launa Wilson.

Boies, Schiller & Flexner LLP and *Douglass A. Mitchell*, Las Vegas, for Appellant Larry Lancto.

Snell & Wilmer, LLP, and *D. Neal Tomlinson, Gregory A. Brower*, and *Richard C. Gordon*, Las Vegas; *Baker Botts, LLP*, and *J. Gregory Copeland* and *Mark R. Robeck*, Houston, Texas, for Respondents Reliant Energy, Inc.; Reliant Resources, Inc.; and Kathleen M. Zanaboni.

Kemp, Jones & Coulthard, LLP, and *William S. Kemp*, Las Vegas, for Respondent CenterPoint Energy, Inc.

1. APPEAL AND ERROR.
   Plaintiffs' motion to alter or amend order dismissing their complaint, which the district court treated as a motion for reconsideration, tolled the period within which plaintiffs were required to file their notice of appeal. NRAP 4(a)(4).
2. APPEAL AND ERROR.
   The supreme court reviews de novo an order granting a motion to dismiss for failure to state a claim upon which relief can be granted, accepting all factual allegations in the complaint as true, and drawing all inferences in the plaintiff's favor. NRCP 12(b)(5).
3. APPEAL AND ERROR.
   The supreme court will uphold an order of dismissal for failure to state a claim when it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle the plaintiff to relief.
4. APPEAL AND ERROR.
   The supreme court reviews de novo the district court's preemption analysis.
5. STATES.
   Doctrine of preemption arises from the Supremacy Clause. U.S. CONST. art. 6, cl. 2.
6. STATES.
   Under the Supremacy Clause, federal law preempts state law when Congress expressly so provides, or when the state law conflicts with the terms or purposes behind federal law. U.S. CONST. art. 6, cl. 2.
7. STATES.
   There are two types of implied preemption of state law by federal law: field preemption and conflict preemption. U.S. CONST. art. 6, cl. 2.
8. STATES.
   ''Field preemption'' occurs when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field. U.S. CONST. art. 6, cl. 2.
9. STATES.
   To determine whether Congress has preempted a field of state law, the supreme court examines the entire regulatory scheme to determine whether, based on its level of comprehensiveness or the nature of the field regulated, Congress intended to preclude states from also imposing requirements on that field; if so, state law is preempted regardless of conflict. U.S. CONST. art. 6, cl. 2.
10. GAS; STATES.
    The doctrine of federal field preemption applied to bar claim brought by natural gas consumers and the State, in its proprietary capacity as a direct or indirect purchaser of natural gas and natural gas transportation services, pursuant to state's Unfair Trade Practices Act (UTPA) against

wholesalers of natural gas, alleging that wholesalers conspired with now-defunct energy company to drive up price of natural gas in certain markets in state and neighboring state; federal legislation deregulating natural gas industry, read together, did not indicate that Congress no longer intended to occupy the field, and Federal Energy Regulatory Commission (FERC) used deregulation as a means to increase market competition, not as a means to open up regulation to all 50 states. Natural Gas Act, § 1, 15 U.S.C. § 717; Natural Gas Policy Act of 1978, § 2, 15 U.S.C. § 3301 *et seq.*; Natural Gas Wellhead Decontrol Act of 1989, § 1 *et seq.*, 15 U.S.C. § 3301 note; NRS 598A.060(1).

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, C.J.:

Due in part to significant manipulation of the natural gas markets from 2000 to 2001, gas and electricity prices skyrocketed in Nevada and other western states. This case arises out of the resulting energy crisis. In this case, appellants alleged that respondents, in violation of Nevada antitrust laws, conspired with the now-defunct Enron Corporation to drive up the price of natural gas in the Southern Nevada and Southeastern California markets. Appellants asserted that respondents engaged in rapid bursts of purchasing natural gas followed by rapid bursts of selling the same gas, which resulted in considerable profits for respondents and significantly higher prices for natural gas consumers. Appellants further alleged that respondents' plan for manipulating the markets worked because of a secret agreement with Enron that left respondents with greater profits from the sale of gas as well as ensured that respondents would always have a sufficient supply of natural gas. The district court ultimately dismissed the case, holding that the claims were barred by principles of federal preemption. We, like the district court, conclude that appellants' claim is preempted by federal law.

FACTS

Gas and electric energy prices skyrocketed in western markets during an eight-month or longer period in 2000-2001. In response to these extraordinarily high prices, the Federal Energy Regulatory Commission (FERC) conducted an investigation. FERC staff found significant manipulation in the natural gas market, which also affected the electric energy market, but ultimately concluded that supply shortfalls and fatally flawed market design were the root causes of the markets' meltdowns.

---

[1]THE HONORABLE RON PARRAGUIRRE, Justice, did not participate in the decision of these matters.

Nevertheless, appellants the State of Nevada[2] and Peggy Maze Johnson, Launa Wilson, and Larry Lancto, as class representatives, filed suit in state district court against respondents Reliant Energy, Inc., a Texas Corporation; Reliant Resources, Inc.; CenterPoint Energy, Inc.; and Kathleen Zanaboni, a Reliant trader. Appellants asserted a single claim for antitrust violations under Nevada's Unfair Trade Practices Act (UTPA), NRS Chapter 598A, based on allegations that, between November 2000 and March 2001, Reliant, through Zanaboni, conspired with Enron to manipulate the natural gas market in order to obtain greater profits for itself while driving up natural gas prices for other consumers. Appellants claimed that, along the lines of what was described in the Federal Energy Regulatory Commission, *Final Report on Price Manipulation in Western Markets* (2003) (Final Report), Reliant engaged in this manipulation through high-volume, rapid-burst trading, often buying and selling many times its needs in quick bursts—an activity FERC termed churning—in order to artificially increase the overall market price of natural gas.[3] Further, appellants alleged, Reliant and Enron orally agreed to average the purchase prices and to separately average the sales prices and then net them against each other, which, due to the market's structure, ensured supply and resulted in profits to Reliant.

FERC determined that Reliant's sales were subject to its jurisdiction, but because FERC's regulations lacked explicit guidelines or prohibitions against Reliant's churning, its behavior was not in violation of FERC's regulations. *See* Final Report. In its Final Report, FERC recommended an amendment to the regulations to provide explicit guidelines or prohibitions to control the trading of natural gas.

Pointing to the FERC report, respondents separately moved to dismiss the complaint for, *inter alia*, failure to state a claim upon which relief can be granted, asserting that the UTPA claim was preempted by federal law. Zanaboni also moved to dismiss for lack of personal jurisdiction. Appellants opposed these motions to dismiss.

---

[2]The State of Nevada sued in its proprietary capacity as a direct or indirect purchaser of natural gas and natural gas transportation services and also in its capacity as parens patriae on behalf of the residents of the areas of Southern Nevada who are direct or indirect purchasers of delivered natural gas services.

[3]''In churning, volumes of natural gas are sequentially bought and sold by a trader and counterparty so that each time a buy/sell cycle is complete, the basis price has been incrementally increased without the net exchange of any actual natural gas.'' *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 849 (Tenn. 2010) (internal quotations omitted). ''Basis is the difference between the commodity price of natural gas as quoted on the New York Mercantile Exchange and the price paid for natural gas at the California border. Thus, basis generally reflects the cost of transportation.'' *E. & J. Gallo Winery v. Encana Corp.,* 503 F.3d 1027, 1032 n.2 (9th Cir. 2007).

The district court granted the motions to dismiss, determining that Nevada's UTPA did not apply because the alleged misconduct in the natural gas market is governed by federal law and, thus, the claim was preempted. The district court further determined that it did not have jurisdiction over Zanaboni because sufficient contacts with Nevada had not been established.

[Headnote 1]

Appellants then filed a motion to alter or amend the dismissal order for two reasons—(1) the court had expressly relied on federal decisions that were later reversed and vacated, and (2) recent caselaw demonstrated that FERC does not have exclusive jurisdiction over the wholesale natural gas market; consequently, the State of Nevada is not prohibited from applying its antitrust laws to respondents' conduct. Respondents opposed the motion. The district court denied the motion, and this appeal followed.[4]

DISCUSSION

Standard of review

[Headnotes 2-4]

This court reviews de novo an order granting an NRCP 12(b)(5) motion to dismiss, accepting all factual allegations in the complaint as true, and drawing all inferences in the plaintiffs' favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). We will uphold an order of dismissal when it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle him or her to relief. *Id.* We also review de novo the district court's preemption analysis. *See Nanopierce Tech. v. Depository Trust*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007).

Appellants' claim arises under Nevada's UTPA, which is codified in NRS Chapter 598A. In particular, appellants assert that respondents' alleged price-fixing activities violated NRS 598A.060(1). Respondents contend, however, that because FERC was conferred with exclusive jurisdiction to ensure that the interstate sales of natural gas have just and reasonable rates, appellants' claim is preempted by federal law.

---

[4]Respondents assert that this appeal is untimely because the district court treated the motion to alter or amend as one for reconsideration, and under prior decisional law, motions for reconsideration did not toll the appeal period. *See Alvis v. State, Gaming Control Bd.*, 99 Nev. 184, 186 n.1, 660 P.2d 980, 981 n.1 (1983), *disapproved of by AA Primo Builders v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010). Recently, however, we determined that, in most circumstances, there is no valid basis for distinguishing the two types of motions, and thus, timely filed motions for reconsideration may toll the appeal period. NRAP 4(a)(4); *AA Primo Builders*, 126 Nev. at 583-84, 245 P.3d at 1194-95. Accordingly, regardless of whether the motion merely sought ''reconsideration,'' this appeal is timely, and we have jurisdiction.

Federal preemption

[Headnotes 5, 6]

The doctrine of preemption arises from the United States Constitution's Supremacy Clause. *Nanopierce*, 123 Nev. at 370, 168 P.3d at 79. Under the Supremacy Clause, federal law preempts state law when Congress expressly so provides, or when the state law conflicts with the terms or purposes behind federal law. *Id*. at 370-71, 168 P.3d at 79. Because federal law does not contain an express provision preempting state antitrust law in this instance, only implied preemption is at issue here.

[Headnotes 7-9]

There are two types of implied preemption: field preemption and conflict preemption. *Id*. at 371-72, 168 P.3d at 79-80. The parties' arguments here concern the first type, field preemption. Field preemption occurs ''when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field.'' *Id*. at 371, 168 P.3d at 79. Thus, we examine ''the entire regulatory scheme . . . to determine whether, based on its level of comprehensiveness or the nature of the field regulated, Congress intended to preclude states from also imposing requirements on that field.'' *Id*. at 371, 168 P.3d at 79-80. If so, state law is preempted regardless of conflict. *Id*.

Appellants argue that field preemption is inapplicable to this case because even though the field historically had been preempted, at the time of the alleged market manipulation, the field had been deregulated and was no longer subject to FERC control. Respondents counter that deregulation of a federally controlled field does not, without more, demonstrate Congressional intent to allow states to then regulate the field.

To determine whether congressional deregulation of natural gas sales means that state regulation of such sales is permissible, we review the historical background of federal regulation over the transportation and sale of natural gas, which has been set forth in large part by the Ninth Circuit Court of Appeals in *E. & J. Gallo Winery v. Encana Corp.,* 503 F.3d 1027, 1036 (9th Cir. 2007), and other courts that have addressed related issues.

The federal energy regulatory system

The natural gas market has traditionally consisted of three segments—producers at the natural gas wellhead, interstate pipelines that transport the gas from the wellhead to local distributers around the country, and local distributors who sell the gas to consumers. *In re Hawaiian & Guamanian Cabotage Antitrust*, 647 F. Supp. 2d 1250, 1264 (W.D. Wash. 2009) (citing *E. & J. Gallo Winery v. Encana Corp.,* 503 F.3d 1027, 1036 (9th Cir. 2007)). Because the

interstate pipelines controlled the gas's transportation, they developed monopoly power over both natural gas purchases from the wellhead and sales to local distribution companies. *Gallo,* 503 F.3d at 1036 (citing *General Motors Corp. v. Tracy,* 519 U.S. 278, 283 (1997)).

During the Great Depression, Congress passed the Natural Gas Act (NGA), Pub. L. No. 75-688, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. § 717 (2006)), thereby conferring upon FERC jurisdiction over wholesale rates charged by producers and sale-for-resale rates charged by interstate pipelines in an attempt to curb the market power of interstate pipelines. *Hawaiian*, 647 F. Supp. 2d at 1264 (citing *Gallo,* 503 F.3d at 1036). The NGA required natural gas companies to file their rates for transportation and sale with FERC, which then was authorized to determine the lawfulness of the rates under the NGA requirement that the natural gas rates ''shall be just and reasonable.'' 15 U.S.C. § 717c(a) (2006); *Gallo,* 503 F.3d at 1034. This procedure gave rise to the filed-rate doctrine, under which federal courts, and state courts through preemption principles, were precluded from awarding damages that would, in essence, alter the FERC-approved rate. *Gallo*, 503 F.3d at 1034-35.

In 1963, the Supreme Court explained in *Northern Gas Co. v. Kansas Commission* that the NGA is ''a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce,' '' 372 U.S. 84, 91 (1963) (quoting *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 682 (1954)), and articulated that no room has been left ''either for direct state regulation of the prices of interstate wholesales of natural gas, *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 [(1955)], or for state regulations which would indirectly achieve the same result.'' 372 U.S. at 91.

The federal regulatory system was overburdened, however, and together with FERC's imposition of low price ceilings on wellhead sales, it led to natural gas shortages in the 1970s. *Gallo*, 503 F.3d at 1036. These natural gas shortages prompted Congress to deregulate the industry. *Id.* at 1036-37; *Hawaiian*, 647 F. Supp. 2d at 1264. To do so, Congress passed the Natural Gas Policy Act of 1978 (NGPA), Pub. L. No. 95-621, 92 Stat. 3350 (1978) (codified as amended at 15 U.S.C. §§ 3301-3432 (2006)), which removed the low price ceilings on wellhead sales, instead imposing maximum price ceilings. Regarding the NGPA's effect on field preemption, the Supreme Court confirmed in a 5-4 decision in *Transcontinental Pipe Line v. State Oil & Gas Board* that, based on content and legislative history, the NGPA did not signal a retreat from comprehensive federal gas policy and, ''in some respects expanded federal control, since it granted FERC jurisdiction over the intrastate market for the first time.'' 474 U.S. 409, 421 (1986) (cit-

ing 15 U.S.C. §§ 3371-3372). The Court determined that ''[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.'' *Id.* at 422 (quoting *Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n*, 461 U.S. 375, 384 (1983)). Accordingly, the NGPA did not eliminate field preemption over natural gas sales.

Later, in 1989, Congress removed FERC's ability to set prices on wellhead sales (or ''first sales''[5]) altogether when it enacted the Natural Gas Wellhead Decontrol Act of 1989 (WDA), Pub. L. No. 101-60, 103 Stat. 157 (1989). By eliminating FERC's authority to set prices of wellhead sales, Congress subjected such sales to market forces. *Gallo*, 503 F.3d at 1037; *see also Hawaiian*, 647 F. Supp. 2d at 1264. Despite the deregulation of first sales, however, interstate pipelines apparently ''continued to 'bundle' their transportation service with their own natural gas sales and require customers to purchase both.'' *Gallo*, 503 F.3d at 1037. As a result, customers were unable to benefit from market competition at the wellhead. *Id.* at 1037-38.

FERC also began to implement deregulation policies to address these issues. FERC issued Order 636, now codified at 18 C.F.R. §§ 284.281-.288, requiring the interstate pipelines to separate transportation services from gas sales and ''issuing 'blanket sale' certificates to interstate pipelines, allowing them to sell unbundled natural gas at market-based rates.'' *Hawaiian*, 647 F. Supp. 2d at 1264 (citing *Gallo*, 503 F.3d at 1038). In Order 636, FERC explained that it was ''instituting light-handed regulation, relying upon market forces at the wellhead or in the field to constrain unbundled pipeline sale for resale gas prices within the NGA's ''just

---

[5]A first sale is

> any sale of any volume of natural gas—
>
> (i) to any interstate pipeline or intrastate pipeline;
>
> (ii) to any local distribution company;
>
> (iii) to any person for use by such person;
>
> (iv) which precedes any sale described in clauses (i), (ii), or (iii); and
>
> (v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this chapter.
>
> (B) Certain sales not included
>
> Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

15 U.S.C. § 3301(21).

and reasonable'' standard.' '' *Gallo*, 503 F.3d at 1042 (quoting Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 13,297 (April 16, 1992) (codified at 18 C.F.R. pt. 284)). FERC also began issuing blanket certificates[6] for sales for resale, meaning that those sales, like wellhead sales, would be subject to market prices. *Id.* at 1038 (citing Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. at 13,270).[7]

Commencing in the summer of 2000, both natural gas and electricity prices dramatically rose at the California border markets, in part because of widespread manipulation by energy traders. *Gallo*, 503 F.3d at 1031; *see* Final Report. After FERC completed an investigation in 2003, it noted that ''there was neither a formal process . . . nor any oversight by [FERC]'' for the price calculation of natural gas, and it concluded in its Final Report that the information being used to generate the natural gas ''market'' prices ''was reported in a less than meticulous manner,'' that the price indices were ''ripe for manipulation,'' and that market participants had actually engaged in misconduct, including providing ''false reports of natural gas prices and trade volumes.'' *Id.* at 1031-32 (citing Final Report).

After the period at issue in this case, FERC revised its blanket market certificates to clearly prohibit anticompetitive behavior and market abuses. *Gallo*, 503 F.3d at 1038 (citing Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323 (Nov. 17, 2003) (codified at 18 C.F.R. pt. 284)). This alteration was based on FERC's determination that price manipulation had occurred in prior years. *Id.*

---

[6]The NGA required natural gas companies to have a certificate of public convenience and necessity issued by FERC before they could engage in sales for resale within FERC's jurisdiction. 15 U.S.C. § 717f(c)(1)(A) (2006). However, FERC decided to issue blanket certificates authorizing pipelines and other persons selling natural gas to make wholesale sales at negotiated or market-based rates and freed the blanket certificate holders from ''other regulation under the Natural Gas Act jurisdiction of [FERC].'' 18 C.F.R. § 284.402(a) (2012); *see* 18 C.F.R. § 284.284(a) (2012). These ''blanket certificates were issued by operation of the rule itself and there was no requirement for persons to file applications seeking such authorization.'' Amendments to Blanket Sales Certificates, 68 Fed. Reg. 40,207, 40,208 (June 26, 2003) (codified at 18 C.F.R. pt. 284).

[7]It is notable that after deciding to issue blanket certificates, FERC advised the industry that it would use the complaint process to continue to '' 'monitor the operation of the market.' '' *Gallo*, 503 F.3d at 1038 (quoting Prevailing Rate Systems, 57 Fed. Reg. 57,875, 57,958 (Dec. 8, 1992) (codified at 5 C.F.R. pt. 532)). On occasion, FERC exercised this oversight authority. *Id.* (citing *Enron Power Mktg., Inc.*, 103 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,343, at ¶ 72 (2003) (revoking Enron's blanket market certificate)); *see also* Order Directing Staff Investigation, 98 F.E.R.C. ¶ 61,165 (2002) (ordering an investigation into short-term price manipulation in electric energy and natural gas markets in the western United States).

Application of Nevada's UTPA

[Headnote 10]

With this history in mind, we now examine the law on preemption and flesh out whether Nevada's UTPA can be applied in this case.

This particular issue has been analyzed by the Tennessee Supreme Court in *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010), and by the Ninth Circuit Court of Appeals in *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007), with vastly different results.

We find the reasoning in *Leggett* to be more persuasive. In *Leggett*, a class action antitrust suit, the defendants, including Reliant, were alleged to have participated in various anticompetitive practices to artificially inflate the price of wholesale natural gas, ''including making false statements about natural gas transactions and engaging in 'wash trades'[8] and 'churning.' '' 308 S.W.3d at 848. The plaintiffs claimed that, in light of the deregulation of the natural gas industry, preemption did not apply to their claims because they arose in part from transactions that were not within FERC's jurisdiction. *Id.* at 864-65. The court, while acknowledging that deregulation complicated the inquiry, disagreed. *Id.* at 865. It noted that because deregulation ensures ''that an industry is not overburdened by an 'intricate web' of restrictive requirements[,] . . . the scope and complexity of the relevant federal statutes are less helpful indicators of congressional intent than they would ordinarily be.'' *Id.* at 866. The court indicated that because of this circumstantial difficulty, congressional intent must be ascertained from other indicators. *Id.*

The *Leggett* court explained that because it was well-established ''that Congress had enacted broad field pre-emption prior to the WDA,'' the question was ''whether Congress repealed or reduced the scope of the pre-emptive regime, not whether it intended to implement an entirely new system of pre-emption.'' *Id.* The court determined that ''in this case, the WDA, when read in the context of the NGA and NGPA—altogether precludes states from regulation.'' *Id.* In so concluding, the court quoted the United States Supreme Court's observation in *Transcontinental Pipe Line v. State Oil & Gas Board* (*Transcon)* concerning the NGPA:

> The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, but the NGPA reflects a

[8]''A wash trade is a transaction where two parties simultaneously buy and sell the same quantity of natural gas at the same price and on the same day. This creates a false appearance of demand for and short supply of natural gas.'' *Gallo*, 503 F.3d at 1032 n.3.

> congressional belief that a new system of natural gas pricing was needed to balance supply and demand. The new federal role is to ''overse[e] a national market price regulatory scheme.'' The NGPA therefore does not constitute a federal retreat from a comprehensive gas policy.

Leggett, 308 S.W.3d at 866 (quoting *Transcon*, 474 U.S. 409, 421 (1986)). ''In other words, the purpose of the NGPA was not to withdraw from the regulation of the wholesale natural gas market, but instead to replace the older, more direct method of exercising that responsibility with a newer, more hands-off approach.'' *Id*. The *Leggett* court applied this logic to the WDA and concluded that Congress was again trying to deregulate but was not putting an end to federal oversight. *Id*. The court concluded that these mere changes in approach did not contract the scope of preemption, as FERC has continued to regulate and refine the pricing policy since the WDA. *Id*. at 866-67. ''A tool has merely been eliminated by the Congress—the ability to regulate directly the price of first sales—just as Congress eliminated the direct regulation of the first sale price of new and high-cost gas in the NGPA.'' *Id*. at 867. The court further concluded that since Congress intended for the WDA to deregulate the market, it would be nonsensical ''to conclude that Congress simultaneously intended to expand states' authority to regulate that same market'' when ''nothing . . . suggests a congressional aim to benefit the market by yielding to more intrusive legislation by the states.'' *Id*.

It has often been stated that the act of deregulation has the same preemptive force as regulation. *See Transcon*, 474 U.S. at 415 (citing *Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n*, 461 U.S. 375, 384 (1983)). The decision to deregulate was not a decision to no longer occupy the field. *See id*. at 422 (concluding that limiting FERC's power to regulate specific aspects of the first sale of gas was a result of Congress's desire to leave price and supply determinations of some first sales to the market). FERC used deregulation as a means to increase market competition. It did not use this tool as a means to open up regulation to all 50 states.

The Ninth Circuit, in *Gallo*, conducted the same analysis as *Leggett* but ultimately came to a different result. In *Gallo*, the appellant alleged that the defendants violated state and federal antitrust laws and thereby inflated the price that the appellant had paid for natural gas. *Id*. at 1030. The claims involved ''engag[ing] in a number of illegal practices designed to manipulate the indices, including agreeing to set . . . natural gas [prices] at an inflated rate, misreporting natural gas prices paid to the indices, and engaging in 'wash trades.''' *Id*. at 1032. Gallo sought to recover

damages for the amount that it was overcharged through the use of a hypothetical fair index price. *Id.*

In its analysis, the Ninth Circuit determined that field preemption does not bar the damages claims. *Id.* at 1046. The court pointed out that Congress is presumed to know the existing state and federal law governing antitrust and damages claims, and that such laws of general applicability are ordinarily not preempted. *Id.* Using these principles, the *Gallo* court concluded that neither the NGPA nor the WDA ''includes language suggesting that Congress intended to displace state antitrust or damage laws by withdrawing first sales from the NGA.'' *Id.* The court reasoned that because Congress did not expressly preempt state claims, preemption was not intended. *Id.* The Ninth Circuit determined that state and federal antitrust and fair competition laws ''complement rather than undermine'' Congress's goal to move toward a less-regulated market for natural gas. *Id.* The court concluded that, because lawsuits were part of the market forces to which Congress subjected first sales, the antitrust and damages claims were not barred by preemption: ''[j]ust as Congress's direction to FERC to determine just and reasonable rates gave rise to the inference that Congress preempted damage claims per the Filed Rate Doctrine, the withdrawal of FERC's authority to determine such rates gives rise to the opposite inference, that normal market forces, including the tug and pull of private lawsuits, will hold sway.'' *Id.*[9]

We cannot agree. As pointed out in *Leggett*, the conclusion that there is no preemption leads to the imposition on interstate natural gas wholesalers 50 different sets of state rules concerning anticompetitive behavior. 308 S.W.3d at 869. To allow intervention by the states would devastate ''two of the additional purposes of the federal statutory scheme: national uniformity and freedom from burdensome government intervention.'' *Id.* at 868-69. From a practical standpoint, if each state intervened in this field with different regulations, the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market. We cannot conclude that this is what Congress intended through the use of purposeful deregulation. State antitrust law cannot coexist peacefully with the natural gas federal regulations. Accordingly, we conclude that even if Nevada's UTPA is complementary to the federal regulatory scheme, it nonetheless improperly encroaches upon the field.

We thus conclude that the district court was correct to dismiss this case, as appellants' claims are barred by federal field preemption. While this conclusion fails to provide redress for our cit-

---

[9]While the Ninth Circuit in *Gallo* went on to focus its attention on the filed-rate doctrine, we conclude that the filed-rate doctrine is inapplicable in light of our conclusion that the field is preempted. 503 F.3d at 1041-42.

izens, the long and entangled history of natural gas regulation in this country requires this result. Because Congress has afforded no room for the imposition of state-law requirements, federal preemption bars this action.

CONCLUSION

Because the claims under the UTPA are preempted by federal law, appellants have not stated a claim upon which relief can be granted. Accordingly, the district court properly dismissed appellants' complaint.[10]

DOUGLAS, SAITTA, GIBBONS, PICKERING, and HARDESTY, JJ., concur.

GOLD RIDGE PARTNERS, A CALIFORNIA GENERAL PARTNERSHIP, AS TO AN UNDIVIDED 1/4 INTEREST; SKY VIEW PARTNERS, A CALIFORNIA GENERAL PARTNERSHIP, AS TO AN UNDIVIDED 1/4 INTEREST; GRAND VIEW PARTNERS, A CALIFORNIA GENERAL PARTNERSHIP, AS TO AN UNDIVIDED 1/4 INTEREST; ROLLING HILLS PARTNERS, A CALIFORNIA GENERAL PARTNERSHIP, AS TO AN UNDIVIDED 1/4 INTEREST; AND FIRST FINANCIAL PLANNING CORPORATION, A NEVADA CORPORATION, APPELLANTS/CROSS-RESPONDENTS, *v.* SIERRA PACIFIC POWER COMPANY, A NEVADA CORPORATION, RESPONDENT/CROSS-APPELLANT.

No. 57084

September 27, 2012 285 P.3d 1059

Motion for remand in an appeal and cross-appeal from a district court judgment in an eminent domain action. First Judicial District Court, Storey County; James Todd Russell, Judge.

Power company instituted eminent domain action against landowners. The district court entered judgment on jury verdict, finding that power company owed landowners $4.4 million as just compensation, and entered a judgment of condemnation. Landowners appealed, and power company cross-appealed. While the appeals were pending, power company filed notice of its intent to abandon the condemnation proceedings and a motion to vacate the judgment of condemnation. The district court certified its inclination to grant the motion to vacate based on its conclusion that power company was entitled to abandon the proceedings and mo-

[10]All other arguments raised on appeal either lack merit or are rendered moot by this disposition.

tion for remand followed. The supreme court, PARRAGUIRRE, J., held that: (1) public agency may abandon an eminent domain action, pursuant to statutory authority, after it has paid just compensation and the district court has entered a final order of condemnation, but before the resolution of issues pending on appeal; (2) power company was authorized by statute to abandon the condemnation proceeding; and (3) the district court had jurisdiction to consider power company's notice of abandonment of condemnation proceeding and motion to vacate the judgment of condemnation.

Motion denied as moot.

Cotton, Driggs, Walch, Holley, Woloson & Thompson and *Stacy D. Harrop* and *Gregory J. Walch*, Las Vegas, for Appellants/Cross-Respondents.

Law Offices of Michael G. Chapman and *Michael G. Chapman* and *Michelle L. Stone*, Reno, for Respondent/Cross-Appellant.

1. CONSTITUTIONAL LAW.
   Nevada Constitution protects against the taking of private property for public use without just compensation. Const. art. 1, § 8(6).
2. EMINENT DOMAIN.
   When a public agency seeks to obtain private property through the taking process, it must first show that the condemnation is necessary and will be used for a public use; the value of the property and any damages to the defendant property owner associated with the taking are assessed by the district court, a jury, commissioners, or a master. NRS 37.040(1) and (2), 37.110, 37.120.
3. EMINENT DOMAIN.
   A condemnation proceeding is ultimately resolved by a ''final judgment,'' which is a judgment that cannot be directly attacked by appeal, motion for a new trial, or motion to vacate the judgment. Within 30 days after entry of the final judgment, the public agency must deposit into court the sum of money assessed as just compensation in the proceeding, and once the money is deposited, the district court will enter a final order of condemnation describing the property and the purpose of the condemnation. NRS 37.009(2), 37.140, 37.150, 37.160.
4. EMINENT DOMAIN.
   The public agency may take private property for a public use by instituting an eminent domain action and paying just compensation to the property's owner, and if at any time during the pendency of the eminent domain proceeding the public agency determines that it no longer needs the property, the eminent domain statutes provide that the agency may abandon the action and move for dismissal of the case. NRS 37.180(1).
5. APPEAL AND ERROR.
   Questions of statutory interpretation are reviewed de novo.
6. STATUTES.
   The goal of statutory interpretation is to effectuate the Legislature's intent.
7. STATUTES.
   If a statute's language is clear and unambiguous, the supreme court will apply its plain language.

8. STATUTES.
   Plain meaning may be ascertained by examining the context and language of the statute as a whole.
9. EMINENT DOMAIN.
   The public agency in eminent domain action may abandon the proceeding, so long as no more than 30 days has passed since entry of the final judgment; the effect of the eminent domain statute allows the public agency to know for certain how much it will have to pay in just compensation before finally deciding whether it will take the property or abandon the proceeding. NRS 37.180(1).
10. EMINENT DOMAIN.
    Once a taking is complete, an eminent domain plaintiff can no longer compel a property owner to retake property and accept only damages for the detention of the property.
11. EMINENT DOMAIN.
    Because eminent domain statute permits abandonment of condemnation proceeding at any time within 30 days after entry of a ''final judgment,'' the taking cannot be considered complete until the expiration of that time period. NRS 37.180(1).
12. EMINENT DOMAIN.
    Although, by virtue of the parties' stipulation, the district court entered a final order of condemnation and the power company vested title to the property in itself, this action did not render the taking complete, in light of eminent domain statute's clear statement permitting abandonment of condemnation proceeding within 30 days of the final judgment and the parties' knowledge that no final judgment had been entered, as issues were being appealed to the supreme court, and thus, the power company was authorized by statute to abandon the condemnation proceeding. NRS 37.180(1).
13. APPEAL AND ERROR.
    The timely filing of a notice of appeal generally divests the district court of jurisdiction to act in matters pending before the supreme court, such that the district court only retains jurisdiction to consider collateral matters.
14. EMINENT DOMAIN.
    Because a plaintiff is specifically authorized to abandon its eminent domain action while an appeal is pending, the district court must retain a limited jurisdiction during the pendency of the appeal to consider a motion to dismiss filed pursuant to a plaintiff's notice of abandonment. NRS 37.180(1).
15. EMINENT DOMAIN.
    The district court had jurisdiction to consider power company's notice of abandonment of condemnation proceeding and motion to vacate the judgment of condemnation, even though appeal of this matter was pending in the supreme court; because power company was specifically authorized to abandon its condemnation action while an appeal was pending, the district court had to retain a limited jurisdiction during the pendency of the appeal to consider a motion to dismiss filed pursuant to power company's notice of abandonment. NRS 37.180(1).

Before the Court EN BANC.[1]

---

[1]THE HONORABLE KRISTINA PICKERING, Justice, did not participate in the decision of this matter.

OPINION

By the Court, PARRAGUIRRE, J.:

In this opinion, we address a motion to remand in an eminent domain action. Under Nevada law, a public agency may take private property for a public use by instituting an eminent domain action and paying just compensation to the property's owner. If, at any time during the pendency of the eminent domain proceeding, the public agency determines that it no longer needs the property, the eminent domain statutes provide that the agency may abandon the action and move for dismissal of the case. In this proceeding, we consider whether a public agency may abandon an eminent domain action, pursuant to this statutory authority, after it has paid just compensation and the district court has entered a final order of condemnation, but before the resolution of issues pending on appeal. Concluding that it can, we further determine that the district court retains jurisdiction to address a notice of abandonment and motion to dismiss, even while an appeal of the matter is pending in this court. Thus, we deny the motion to remand as moot because a remand is unnecessary for the district court to decide the motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

In the district court, respondent/cross-appellant Sierra Pacific Power Company instituted an eminent domain action against appellants/cross-respondents Gold Ridge Partners, Sky View Partners, Grand View Partners, Rolling Hills Partners, and First Financial Planning Corporation (the landowners), seeking to take certain property owned by the landowners in order to use it as an electrical substation. The district court awarded Sierra Pacific possession of the property at the outset of the proceedings, and a jury trial was held to determine the amount of money due to the landowners for the taking of their property. At the conclusion of the trial, the jury found that Sierra Pacific owed the landowners $4.4 million as just compensation.

Following the trial, the parties entered into a ''stipulation for entry of judgment and for entry of final order of condemnation,'' in which they agreed that Sierra Pacific would pay the just compensation amount into court and the landowners would take steps to satisfy and have released all encumbrances on the land. Consistent with the agreement, Sierra Pacific paid the judgment amount, and the district court entered a ''judgment of condemnation'' and a ''final order of condemnation,'' which Sierra Pacific recorded. The landowners then withdrew the judgment amount

that Sierra Pacific had paid and used the money to pay in full loans secured by deeds of trust against the property. At the same time, the landowners appealed the judgment of condemnation to this court in order to raise issues regarding valuation of the property, and Sierra Pacific cross-appealed from the judgment, also to raise valuation issues.

While the appeals were pending, however, Sierra Pacific filed in the district court a notice of its intent to abandon the condemnation proceedings and a motion to vacate the judgment of condemnation. The landowners objected to the abandonment, arguing, in part, that the district court lacked jurisdiction to permit the abandonment while an appeal was pending. The district court agreed with the landowners that it lacked jurisdiction to enter an order vacating the judgment, but certified its inclination to grant the motion to vacate based on its conclusion that Sierra Pacific was entitled to abandon the proceedings. This motion for remand followed.

In order to put the pending remand motion into context, we begin our discussion with a brief overview and interpretation of the relevant eminent domain statutes before addressing the district court's continuing jurisdiction to resolve the underlying motion, regarding Sierra Pacific's decision to abandon the condemnation, while this appeal is pending.

DISCUSSION

Nevada's eminent domain statutes

[Headnotes 1-3]

The Nevada Constitution protects against the taking of private property for public use without just compensation. Nev. Const. art. 1, § 8(6). To that end, NRS Chapter 37 governs the power of a public agency to take property through eminent domain proceedings. *See* NRS 37.0095(1). When a public agency seeks to obtain private property through this process, it must first show that the condemnation of the property is necessary and will be used for a ''public use.'' NRS 37.040(1) and (2). Once the agency has made such a showing, the value of the property and any damages to the defendant property owner are assessed by the court, a jury, commissioners, or a master. NRS 37.110; NRS 37.120.

Following the determination of damages, the court enters a ''judgment determining the right to condemn [the] property and fixing the amount of compensation to be paid by the plaintiff.'' NRS 37.009(3). If the judgment is appealed to this court, the plaintiff may take or, if it has already done so, remain in possession of the property while the appeal is pending by paying into the district court the full amount of the judgment plus damages for the

taking, as well as any damages that may be sustained if, for any reason, the property is not ultimately taken. NRS 37.170(1). The defendant may then receive the deposited money by filing a satisfaction of the judgment or a receipt for the money and an abandonment of any defenses to the proceedings, other than defenses as to the amount of money to which the defendant is entitled. NRS 37.170(2).

A condemnation proceeding is ultimately resolved by a ''[f]inal judgment,'' which is ''a judgment which cannot be directly attacked by appeal, motion for new trial or motion to vacate the judgment.''[2] NRS 37.009(2). Within 30 days after entry of the final judgment, the plaintiff must deposit into court the sum of money assessed as just compensation in the condemnation proceeding. NRS 37.140; NRS 37.150. Once the money is deposited, the district court will enter a final order of condemnation describing the subject property and the purpose of the condemnation. NRS 37.160. Upon the recording of the final order of condemnation in the office of the county recorder, title to the property vests in the plaintiff. *Id.*

[Headnote 4]

With this background, the first issue we must resolve in this appeal concerns NRS 37.180(1) and the circumstances under which a plaintiff may abandon a condemnation. In particular, under NRS 37.180(1), ''[t]he plaintiff may abandon the [condemnation] proceedings at any time after filing the complaint and before the expiration of 30 days after final judgment.'' If the plaintiff abandons the condemnation proceeding, the district court, on motion of a party, must enter a judgment dismissing the proceedings and awarding costs and attorney fees to the defendants. *Id.* Additionally, if the plaintiff has been in possession of the property, the defendant is entitled to any damages caused by the plaintiff's occupancy. NRS 37.180(2).

[Headnotes 5-8]

Questions of statutory interpretation are reviewed de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). The goal of statutory interpretation is to effectuate the Legislature's intent. *Savage v. Dist. Ct.*, 125 Nev. 9, 16, 200 P.3d 77, 82 (2009). If a statute's language is clear and unambiguous, this court will apply its plain language. *Leven*, 123 Nev. at 403, 168 P.3d at 715. Plain

---

[2]Generally, in civil appeals, a final judgment is an appealable decision. *See* NRAP 3A(b)(1). In a condemnation action, however, the ''judgment'' is the appealable decision, *see* NRS 37.009(3); NRS 37.170(1), whereas the ''[f]inal judgment'' refers to a judgment that can no longer be ''attacked by appeal.'' *See* NRS 37.009(2).

meaning may be ascertained by examining the context and language of the statute as a whole. *Redl v. Secretary of State*, 120 Nev. 75, 78, 85 P.3d 797, 799 (2004).

[Headnote 9]

Thus, under the plain language of NRS 37.180(1), an eminent domain plaintiff may abandon the proceeding, so long as no more than 30 days has passed since entry of the final judgment. The effect of NRS 37.180(1) is that a public agency in an eminent domain action will know for certain how much it will have to pay in just compensation before finally deciding whether it will take the subject property or abandon the proceeding. *See id*.

In this case, the landowners assert that Sierra Pacific lost its statutory right to abandon the proceeding at the end of the trial when Sierra Pacific chose to pay the judgment amount in order to retain possession of the property while the appeal was pending. This contention is contrary to the plain language of the eminent domain statutes, as a final judgment had not been entered in this action at that time. *See* NRS 37.009(2); NRS 37.180(1). Indeed, although the parties entered into the stipulation and Sierra Pacific took title to the property, the judgment amount was still open to change, as both Sierra Pacific and the landowners intended to appeal the judgment as to valuation issues. Under the landowners' interpretation of the statutes, if this court reversed the jury's award and the just compensation amount was ultimately set much higher than originally determined, Sierra Pacific would have had no choice but to pay the additional amount without the option of abandoning the proceeding if it determined that the new award was too high. But we conclude that such a result is inconsistent with the language and the apparent intent of NRS 37.180(1).

[Headnotes 10-12]

The landowners alternatively argue that, in this situation, Sierra Pacific cannot constitutionally abandon the proceeding because the taking of the property is already complete, title to the property has vested in Sierra Pacific, and thus, the right to compensation has vested in the landowners. Once a taking is complete, an eminent domain plaintiff can no longer compel a property owner to retake property and accept only damages for the detention of the property. *Carl Roessler, Inc. v. Ives*, 239 A.2d 538, 541 (Conn. 1968). The question of when a taking is complete is determined by the procedure of the state in which the action is proceeding. *Id*. Because NRS 37.180(1) permits abandonment at any time within 30 days after entry of a final judgment in an eminent domain proceeding, the taking cannot be considered complete, under Nevada law, until the expiration of that time period. While we recognize that, by

virtue of the parties' stipulation, the district court entered a final order of condemnation and Sierra Pacific vested title to the property in itself, we cannot conclude that this action rendered the taking complete in light of NRS 37.180's clear statement permitting abandonment within 30 days of the final judgment and the parties' knowledge that no final judgment had been entered, as issues were being appealed to this court. Thus, we conclude that Sierra Pacific is authorized by NRS 37.180(1) to abandon the proceeding in this case.

Because we conclude that Sierra Pacific was within its right to abandon the condemnation proceeding, the next issue we must resolve is whether the district court has jurisdiction, while this appeal is pending, to consider the notice of abandonment and the motion to vacate the judgment.[3]

The district court has jurisdiction to consider the motion to vacate

[Headnote 13]

Sierra Pacific argues that a remand is unnecessary because the district court has jurisdiction to consider the abandonment and consequent motion to vacate the judgment. Generally, the timely filing of a notice of appeal divests the district court of jurisdiction to act in matters pending before this court, such that the district court only retains jurisdiction to consider collateral matters. *Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 454-55 (2010). Here, the motion to vacate the judgment is not a collateral matter, and under the general rule, the district court would not have jurisdiction to consider such a motion while an appeal was pending. As discussed above, however, NRS 37.180(1) permits a public agency to abandon its eminent domain proceeding ''at any time'' between the filing of the complaint and 30 days after a final judgment. Moreover, if the plaintiff abandons the action, the district court must dismiss the proceedings on motion of any party. NRS 37.180(1).

[Headnotes 14, 15]

While this court has previously rejected the argument that the phrase, ''at any time,'' in a child custody modification statute permitted the district court to modify a child custody order when an appeal was pending, *see Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006), unlike NRS 125.510(1)(b), the statute in question in that case, which generally permits a district court to act at any time while a child under its jurisdiction is a

---

[3]Although Sierra Pacific apparently filed a motion to vacate the judgment, rather than a motion to dismiss, as discussed in NRS 37.180(1), the effect of such a motion would be the same, and the district court may treat the motion as a motion to dismiss filed pursuant to the statute.

minor, NRS 37.180(1) *requires* a district court to act on motion of a party during a specific time period, which includes the time when an appeal of the eminent domain matter is pending before this court. *See* NRS 37.180(1) (''Upon . . . abandonment, on motion of any party, a judgment *must be entered* dismissing the proceedings . . . .'' (emphasis added)). Because a plaintiff is specifically authorized to abandon its eminent domain action while an appeal is pending, the district court must retain a limited jurisdiction during the pendency of the appeal to consider a motion to dismiss filed pursuant to a plaintiff's notice of abandonment. *See Community Development Com'n v. Shuffler*, 243 Cal. Rptr. 719, 723 (Ct. App. 1988) (concluding that the district court had jurisdiction, pursuant to a similarly worded statute, to consider a notice of abandonment and motion to set aside that notice, despite the pendency of an appeal in the subject eminent domain proceeding). Furthermore, as an abandonment is likely to render any issues in the appeal moot, it would be illogical to require the plaintiff to wait until the conclusion of the appeal to have the district court adjudicate such a motion. For these reasons, we conclude that a remand in this case is unnecessary, as the district court has jurisdiction to consider Sierra Pacific's notice of abandonment and motion to vacate the judgment.[4] Accordingly, we deny the motion as moot.[5]

DOUGLAS, SAITTA, and HARDESTY, JJ., concur.

GIBBONS, J., with whom CHERRY, C.J., agrees, concurring:

While I concur with the majority that the district court has jurisdiction to consider the motion to vacate, I write separately to emphasize that the district must address the equitable estoppel arguments raised by the landowners in their opposition to the motion to remand. Among other things, the district court should consider the timeline in this case.

Sierra Pacific filed its initial complaint for condemnation on February 27, 2008. On May 16, 2008, the district court granted Sierra Pacific's motion for occupancy. At that time, Sierra Pacific

---

[4]Although the landowners raise an equitable estoppel argument on appeal, it is not clear whether the landowners raised this argument in the district court. Moreover, as such arguments implicate factual issues, which the district court did not address in its certification of its intent to grant the motion to vacate, we decline to rule on the landowners' equitable estoppel arguments in this opinion. We note, however, that when deciding the motion to vacate, the district court should address any properly raised equitable estoppel arguments presented by the landowners.

[5]The stay of briefing entered by this court on December 28, 2011, remains in effect pending further order of this court. Sierra Pacific shall file, within 30 days from the date of this opinion, a status report updating this court as to the status of its notice of abandonment and motion to vacate the judgment in the district court.

deposited the amount of $1,920,000 with the district court clerk. This amount was based upon Sierra Pacific's appraisal of the property. Approximately two years later, the jury awarded the landowners just compensation in the amount of $4.4 million. After the jury award was entered, the parties entered into a stipulation on August 30, 2010, for entry of judgment and for entry of a final order of condemnation. The stipulation was also executed by the attorney for the Borda Family Limited Partnership, which according to the stipulation was the payee of a promissory note and the beneficiary of a deed of trust secured by the subject property. The stipulation contained terms that provided for the satisfaction of the Borda Family Limited Partnership's promissory note.

On August 30, 2010, Sierra Pacific paid the total amount due pursuant to the terms of the stipulation. According to the landowners, the Borda Family Limited Partnership then reconveyed its deed of trust so that Sierra Pacific would receive marketable title to the subject property. In addition to satisfying the promissory note to the Borda Family Limited Partnership, the landowners further assert that they paid off an additional note secured by a deed of trust for the full real estate commission due and owing to Schafer Pacific Properties before distributing the remaining balance of the just compensation amount to approximately 300 of the landowners' partners. On September 21, 2010, the district court entered a judgment of condemnation pursuant to the stipulation entered into by the parties.

The landowners argue that Sierra Pacific was well aware that all payments would be made as a result of the stipulation of August 30, 2010. The landowners further argue that re-purchasing the property from Sierra Pacific at this time is a practical impossibility. Thus, when deciding the motion to vacate, the district court should consider these facts, together with all other factual issues raised by the landowners and Sierra Pacific, to determine whether there are grounds for equitable estoppel. *Mahban v. MGM Grand Hotels*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984).

DAVID EDELSTEIN, APPELLANT, *v.*
BANK OF NEW YORK MELLON, RESPONDENT.

No. 57430

September 27, 2012 286 P.3d 249

Appeal from a district court order denying a petition for judicial review under the foreclosure mediation program. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

After mediation elected by defaulting mortgagor pursuant to the Foreclosure Mediation Program (FMP) failed, mortgagor petitioned for judicial review seeking a determination that original mortgagee's assignee had participated in the mediation in bad faith and sanctions for statutory violations. The district court denied petition. Mortgagor appealed. The supreme court, HARDESTY, J., held that: (1) Mortgage Electronic Registration System (MERS) held an agency relationship with mortgagee, and thus, as an agent for mortgagee and its successors and assigns, had authority to transfer promissory note on behalf of mortgagee and its successors and assigns; (2) MERS was proper beneficiary of deed of trust and, thus, was authorized to assign its beneficial interest in deed of trust to holder of promissory note; (3) assignee of beneficial interest in deed of trust was entitled to enforce the deed of trust; (4) MERS validly transferred promissory note to assignee; (5) assignee of promissory note was entitled to enforce the note even independently of the assignment; and (6) in a matter of first impression, foreclosing bank, which had become through assignment both the beneficiary of the deed of trust and the promissory note, had standing to proceed with nonjudicial foreclosure through the FMP.

Affirmed.

Law Office of Jacob Hafter & Associates and *Jacob L. Hafter* and *Michael K. Naethe*, Las Vegas, for Appellant.

Pite Duncan, LLP, and *Gregg A. Hubley* and *Allison R. Schmidt*, Las Vegas, for Respondent.

1. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   For a valid nonjudicial foreclosure sale to occur, a Foreclosure Mediation Program certificate must be issued. NRS 107.080, 107.086.
2. MORTGAGES.
   Considered a form of mortgage in the state, the deed of trust does not convey title so as to allow the beneficiary to obtain the property without foreclosure and sale, but is considered merely a lien on the property as security for the debt, subject to the laws on foreclosure and sale.
3. MORTGAGES.
   To enforce the obligation created by a deed of trust by nonjudicial foreclosure and sale, the deed of trust and the note must be held together because the holder of the note is only entitled to repayment and does not

have the right under the deed to use the property as a means of satisfying repayment; conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment.

4. MORTGAGES.
When the grantor defaults on a note, the deed-of-trust beneficiary can select the judicial process for foreclosure or the ''nonjudicial'' foreclosure-by-trustee's sale procedure. NRS 40.430, 107.015 *et seq*.

5. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
Under the Foreclosure Mediation Program (FMP), the trustee must serve an election-of-mediation form with the notice of default and election to sell, and if the grantor/homeowner elects to mediate, the beneficiary of the deed of trust or a representative must, in order for an FMP certificate to issue, attend the mediation, mediate in good faith, provide the required documents, or, if attending through a representative, have a person present with authority to modify the loan or access to such a person; the documents that are required are designed to enable a determination both of whether a person with the required authority over the note is available and of whether the party seeking to foreclose is in fact the beneficiary of the deed of trust or a representative. NRS 107.086(4), (5).

6. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
The party seeking to obtain a Foreclosure Mediation Program (FMP) certificate through the FMP must show that it is the proper entity, under the nonjudicial foreclosure statutes, to proceed against the property. NRS 107.015 *et seq*.

7. MORTGAGES.
Under the traditional rule taken to resolve the issue of whether splitting a promissory note and a deed of trust is irreparable or fatal to a beneficiary's entitlement to enforce the note and the deed of trust, a court need only follow the ownership of the note, not the corresponding deed of trust, to determine who has standing to foreclose.

8. MORTGAGES.
To foreclose on a deed of trust, one must be able to enforce both the promissory note and the deed of trust. NRS 107.086(4).

9. MORTGAGES.
Under the Restatement approach, a promissory note and a deed of trust are automatically transferred together unless the parties agree otherwise. Restatement (Third) of Prop.: Mortgages § 5.4(a).

10. CONTRACTS.
When interpreting a written agreement between parties, the court is not at liberty, either to disregard words used by the parties or to insert words that the parties have not made use of; the court cannot reject what the parties inserted, unless it is repugnant to some other part of the instrument.

11. MORTGAGES.
Mortgage Electronic Registration System (MERS), which had been designated in deed of trust both as a ''nominee'' for mortgagee and its successors and assigns, and as a beneficiary of the deed of trust, held an agency relationship with mortgagee, and thus, as an agent for mortgagee and its successors and assigns, had authority to transfer promissory note mortgagor had executed in favor of mortgagee on behalf of mortgagee and its successors and assigns; pursuant to express language of deed of trust, MERS, as nominee for mortgagee and its successors and assigns, had the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the property, and to take any action required of mortgagee.

12. MORTGAGES.

Mortgage Electronic Registration System (MERS) was proper beneficiary of deed of trust and, thus, was authorized to assign its beneficial interest in deed of trust to holder of promissory note securing deed of trust; text of deed of trust repeatedly designated MERS as the proper beneficiary, and it was prudent to have the recorded beneficiary be the actual beneficiary and not just a shell for the ''true'' beneficiary.

13. MORTGAGES.

Mortgage Electronic Registration System (MERS) is capable of being a valid beneficiary of a deed of trust, separate from its role as an agent, *i.e.*, nominee, for the lender; such separation is not irreparable or fatal to either the promissory note or the deed of trust, but it does prevent enforcement of the deed of trust through foreclosure unless the two documents are ultimately held by the same party, and MERS, as a valid beneficiary, may assign its beneficial interest in the deed of trust to the holder of the note, at which time the documents are reunified.

14. APPEAL AND ERROR.

The supreme court reviews a district court's factual determinations deferentially.

15. APPEAL AND ERROR.

The supreme court reviews the district court's legal determinations de novo.

16. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.

Absent factual or legal error, the choice of sanction in a Foreclosure Mediation Program judicial review proceeding is committed to the sound discretion of the district court.

17. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.

Assignee of beneficial interest in deed of trust was entitled to enforce the deed of trust, as certified copies of the deed of trust and the subsequent assignment were produced at the Foreclosure Mediation Program.

18. MORTGAGES.

Mortgage Electronic Registration System (MERS), which, as beneficiary of deed of trust, had assigned its beneficial interest in deed of trust, together with the note securing the deed of trust, to assignee, validly transferred the note to assignee, as MERS was the agent or nominee for original mortgagee's successors and assigns.

19. MORTGAGES.

The supreme court would not consider, on appeal in Foreclosure Mediation Program matter, the issue of whether assignment of deed of trust was invalid because the notary predated the date of the assignment, where mortgagor failed to raise this issue in the district court.

20. MORTGAGES.

To prove that a previous beneficiary of a deed of trust properly assigned its beneficial interest in the deed of trust, the new beneficiary can demonstrate the assignment by means of a signed writing.

21. MORTGAGES.

Assignee of promissory note securing deed of trust was entitled to enforce the note even independently of the assignment, as the note was ''bearer paper,'' such that to enforce the note, assignee would merely have to possess it, and at time of Foreclosure Mediation Program mediation, assignee's trustee possessed the note, and thus, assignee, the beneficiary, was entitled to enforce it.

22. MORTGAGES.

For a subsequent mortgagee to establish that it is entitled to enforce a promissory note, it must present evidence showing endorsement of the note either in its favor or in favor of its servicer.

23. BILLS AND NOTES.
When a promissory note is endorsed to another party, the Uniform Commercial Code permits a note to ''be made payable to bearer or payable to order,'' depending on the type of endorsement. NRS 104.3109.

24. BILLS AND NOTES.
When a negotiable instrument such as a note is endorsed in blank, the instrument becomes payable to bearer. NRS 104.3205(2).

25. BILLS AND NOTES.
A note initially made payable ''to order'' can become a bearer instrument, if it is endorsed in blank.

26. BILLS AND NOTES.
Promissory note was ''bearer paper,'' where original lender endorsed the note to a second lender, who then endorsed the note to a third lender, in blank, with the designation ''pay to the order of . . . without recourse.'' NRS 104.3205(2).

27. APPEAL AND ERROR.
Supreme court would not consider on appeal an argument that appellant raised in reply brief but failed to make in his opening brief.

28. BILLS AND NOTES.
If a note is payable to bearer, that indicates that the person in possession of the promise or order is entitled to payment. NRS 104.3109(1)(a), 104.3201(2), 104.3205(2).

29. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
Foreclosing bank, which had become through assignment both the beneficiary of the deed of trust and the holder of promissory note, resulting in cure of ''split'' between the deed of trust and the promissory note that would preclude nonjudicial foreclosure through the Foreclosure Mediation Program (FMP), had standing to proceed through the FMP.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

[Headnote 1]

In this appeal, which arises out of Nevada's Foreclosure Mediation Program (FMP), we examine the note-holder and beneficial-interest status of a party seeking to foreclose. We conclude that, to participate in the FMP and ultimately obtain an FMP certificate[1] to proceed with the nonjudicial foreclosure of an owner-occupied residence, the party seeking to foreclose must demonstrate that it is both the beneficiary of the deed of trust and the current holder of the promissory note.

In determining whether the party seeking to foreclose in this case met those requirements, we also address whether, as is argued here, the designation of Mortgage Electronic Registration System,

[1]For a valid nonjudicial foreclosure sale to occur under NRS 107.080, a program certificate must be issued. NRS 107.086; *Holt v. Regional Trustee Services Corp.*, 127 Nev. 886, 892-93, 266 P.3d 602, 606 (2011).

Inc. (MERS), as the initial beneficiary of the deed of trust irreparably splits the promissory note and the deed of trust so as to preclude foreclosure. We conclude that when MERS is the named beneficiary and a different entity holds the promissory note, the note and the deed of trust are split, making nonjudicial foreclosure by either improper. However, any split is cured when the promissory note and deed of trust are reunified. Because the foreclosing bank in this case became both the holder of the promissory note and the beneficiary of the deed of trust, we conclude that it had standing to proceed through the FMP.

FACTS AND PROCEDURAL HISTORY

In 2006, appellant David Edelstein executed a promissory note (the note) in favor of lender New American Funding, which provided Edelstein with a loan to buy a house. The note provided that ''the Lender may transfer [the] [n]ote,'' and that ''[t]he Lender or anyone who takes [the] [n]ote by transfer and who is entitled to receive payments under this [n]ote is called the 'Note Holder.' ''

Edelstein and New American Funding also executed a deed of trust to secure the note, which named New American Funding as the lender, Chicago Title as the trustee, and MERS as the beneficiary. Specifically, the deed of trust described ''MERS [as] a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns.'' It also characterized ''MERS [as] the beneficiary under this Security Instrument,'' and later characterized MERS as ''[t]he beneficiary of this Security Instrument . . . (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.'' The deed of trust also stated that ''Borrower understands and agrees that MERS holds only legal title to the Interests granted by Borrower in this Security Instrument,'' but that ''MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender . . . .''

Subsequently, both the note and the deed of trust were transferred several times. With regard to the note, New American Funding created an allonge (the allonge),[2] endorsing the note to the order of Countrywide Bank, N.A. Countrywide Bank then endorsed the note to the order of Countrywide Home Loans, Inc.,

---

[2]An allonge is a ''slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further [e]ndorsements when the original paper is filled with [e]ndorsements.'' *Black's Law Dictionary* 1859 (9th ed. 2009). However, an ''allonge is valid even if space is available on the instrument.'' *Id.*; *see also* NRS 104.3204(1) (''For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.'').

which in turn endorsed the note in blank, as follows: ''Pay to the order of _____ Without Recourse.'' Meanwhile, the deed of trust was also conveyed when MERS granted, assigned, and transferred ''all beneficial interest'' under the deed of trust to respondent Bank of New York Mellon (BNY Mellon); the conveyance language on the assignment stated that it was assigned and transferred ''together with the [N]ote . . . .''[3] BNY Mellon designated ReconTrust Company as its new trustee, replacing Chicago Title. At the time of the mediation, ReconTrust physically possessed (1) the note, which was endorsed in blank, and (2) an assignment of the deed of trust, which named BNY Mellon as the beneficiary.

The foreclosure mediation

Edelstein stopped paying on the note and consequently received a notice of default and election to sell; he subsequently elected to participate in the FMP.

Attending the July 2010 foreclosure mediation was Edelstein and his counsel, as well as counsel for BNY Mellon's loan servicer, Bank of America, who appeared as BNY Mellon's agent and representative. A Bank of America representative with purported authority to negotiate the loan participated by telephone. Bank of America provided certified copies of the note, endorsed in blank, the deed of trust and its assignment, and the substitution of trustee. It also provided a short sale proposal and a broker's price opinion.

After the mediation concluded without resolving the foreclosure issue, the mediator filed a report determining that ''[t]he parties participated but were unable to agree to a loan modification or make other arrangements.'' Notably, the mediator did not report that the beneficiary or its representative failed to attend the mediation, failed to participate in good faith, failed to bring the required documents to the mediation, or did not have authority to mediate.

The proceedings before the district court

On August 5, 2010, Edelstein, acting in proper person, filed a petition for judicial review with the district court, seeking a determination that BNY Mellon had participated in the mediation in bad faith and sanctions for statutory violations. He argued that BNY Mellon failed to ''provide sufficient documents concerning the assignment of the mortgage note, deed of trust[,] and interest in the trust,'' and an appraisal or broker's price opinion. He further argued that BNY Mellon failed to ''have the authority or access to a person with the authority'' to modify the loan as required by NRS 107.086 because the ''person representing [BNY Mellon]

[3]The MERS assignment is dated February 19, 2010, but the allonge and both endorsements are undated. Thus, it is unclear which event occurred first.

was not available to fully negotiate in good faith, and did not provide sufficient documentation that [BNY Mellon] held a legal claim to the beneficial proceeds of the [D]eed.'' Finally, he argued that BNY Mellon ''failed to offer any modification offers.'' Edelstein requested sanctions from the district court based on ''bad faith or failure to comply with statutory requirements.''

Bank of America (on behalf of BNY Mellon) responded, generally disagreeing with each of Edelstein's arguments and also arguing that Edelstein's petition should not be considered because it was untimely. Edelstein, now represented by counsel, replied. He argued that because the allonge was an invalid ''assignment,'' BNY Mellon was ''required legally to show that it own[ed] those rights[,] or it ha[d] no legal authority to be attempting any foreclosure of the Edelstein home.'' Moreover, he contended that MERS' assignment of the deed of trust was invalid because MERS was a ''sham'' beneficiary. Edelstein also argued that his petition for judicial review was timely filed.

The parties reiterated their arguments in multiple hearings before the district court. Edelstein emphasized that ''[BNY] Mellon ha[d] no standing in [the] matter'' because ''[t]here was no chain of title that [came] from New American [Funding] to the acting party, . . . [BNY] Mellon.'' The district court subsequently issued two separate orders. In the first order, the district court found that Edelstein timely filed his petition for judicial review and that BNY Mellon had properly appeared at the mediation. In its second order, the court found that BNY Mellon did not participate in bad faith, that the parties agreed to negotiate further, and that ''absent a timely appeal, a Letter of Certification will issue.'' Edelstein now appeals.

DISCUSSION

The primary issue on appeal is whether BNY Mellon may properly participate in the FMP and obtain an FMP certificate to proceed with foreclosure proceedings against Edelstein.[4] To resolve this issue, we first address the party-status requirements to pursue nonjudicial foreclosure in Nevada and next address whether BNY Mellon met those requirements in the context of NRS 107.086.

---

[4]BNY Mellon also argues that Edelstein's petition was untimely filed and should not have been considered by the district court. Edelstein actually received the statement by mail on or after July 20, 2010. Accordingly, his petition for judicial review was timely filed. FMR 6(2) (2010) (amended and renumbered as FMR 21(2) (effective March 1, 2011)).

The parties also dispute the appropriate standard of review and whether the program requirements must be strictly or substantially complied with, but the opening and answering briefs on appeal were filed before this court's decisions in *Leyva v. National Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275 (2011), and *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 255 P.3d 1281 (2011), which resolve both issues.

Requirements to pursue nonjudicial foreclosure in Nevada

Edelstein argues that ''[t]he first step [within the FMP] requires the beneficiary of a deed of trust to prove to the homeowner that the beneficiary has a right to foreclose on the property.'' With some explanation, we agree.

Background of nonjudicial foreclosures in Nevada

In Nevada, promissory notes on real estate loans are typically secured by deeds of trust on the property. ''The note represents the right to the repayment of the debt, while the [deed of trust] . . . represents the security interest in the property that is being used to secure the note.'' Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence*, 12 Loy. J. Pub. Int. L. 177, 180 (2010). Thus, the borrower, or grantor, executes both the note and the deed of trust in favor of the lender, who was historically the beneficiary under both, and who names a trustee on the deed of trust ''to assure the payment of the debt secured by the trust deed.'' 54A Am. Jur. 2d *Mortgages* § 122 (2009); *see also* NRS 107.028; NRS 107.080. The deed of trust may then be recorded. Former NRS 106.210.[5]

[Headnotes 2, 3]

Considered a form of mortgage in Nevada,[6] the deed of trust does not convey title so as to allow the beneficiary to obtain the property without foreclosure and sale, but is considered merely a lien on the property as security for the debt, subject to the laws on foreclosure and sale. *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298-99, 183 P.3d 895, 901-02 (2008); *Orr v. Ulyatt*, 23 Nev. 134, 140, 43 P. 916, 917-18 (1896). To enforce the obligation by nonjudicial foreclosure and sale, ''[t]he deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment.'' *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011). ''Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment.'' *Id.*; *see also Leyva v. National Default Servicing Corp.*, 127 Nev. 470, 474-75,

---

[5]Prior to 2011, Nevada law provided that any assignment of the beneficial interest under a deed of trust ''may'' be recorded. Assembly Bill 284 amended this statute to now require that ''any assignment of the beneficial interest under a deed of trust *must* be recorded.'' NRS 106.210 (emphasis added); 2011 Nev. Stat., ch. 81, § 1, at 327.

[6]NRS 0.037 states, ''Except as used in chapter 106 of NRS and unless the context otherwise requires, 'mortgage' includes a deed of trust.'' For purposes of this opinion, the two terms will be used interchangeably.

255 P.3d 1275, 1279-80 (2011) (recognizing that the note and the deed of trust must be held by the same person to foreclose under NRS Chapter 107).

[Headnote 4]

When the grantor defaults on the note, the deed-of-trust beneficiary can select the judicial process for foreclosure pursuant to NRS 40.430 or the ''nonjudicial'' foreclosure-by-trustee's sale procedure under NRS Chapter 107. *Nevada Land & Mtge. v. Hidden Wells*, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967). At issue here, in a nonjudicial foreclosure, the trustee may sell the property to satisfy the obligation only after certain statutory requirements are met. NRS 107.080. First, the trustee must give notice by recording a notice of default and election to sell and serving the grantor with a copy of that notice. NRS 107.080(2)(c). The grantor then has a certain number of days in which to make good the deficiency. NRS 107.080(2)(a) and (b). After at least three months have passed from the recording of the notice of default, the trustee must give notice of the sale. NRS 107.080(4). Once the sale is completed, title vests in the purchaser; upon court action, however, a sale may be voided if carried out without substantially complying with the statutory requirements. NRS 107.080(5). *See Rose v. First Federal Savings & Loan*, 105 Nev. 454, 456-57, 777 P.2d 1318, 1319 (1989).

In 2009, amid concerns with the rapidly growing foreclosure rate in this state, the Legislature enacted additional requirements that trustees must meet before proceeding with a nonjudicial foreclosure of owner-occupied housing. A.B. 149, 75th Leg. (Nev. 2009); *see Pasillas v. HSBC Bank USA*, 127 Nev. 462, 465, 255 P.3d 1281, 1284 (2011). The legislation increased the redemption period for owner-occupied housing, *see* NRS 107.080(2)(b), and it created the FMP, requiring the trustee to obtain and record an FMP certificate before proceeding with the foreclosure. *See* NRS 107.086.

[Headnotes 5, 6]

Under the FMP, as described in *Pasillas*, the trustee must serve an election-of-mediation form with the notice of default and election to sell. 127 Nev. 462, 255 P.3d 1284; *see also Holt v. Regional Trustee Services Corp.*, 127 Nev. 886, 892, 266 P.3d 602, 606 (2011). If the grantor/homeowner elects to mediate, the beneficiary of the deed of trust or a representative must, in order for an FMP certificate to issue, ''(1) attend the mediation; (2) mediate in good faith; (3) provide the required documents; or (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person.'' *Pasillas*, 127 Nev. at 466, 255 P.3d at 1284 (citing NRS 107.086(5)); *see also Holt*, 127 Nev. at 893, 266 P.3d at 606. The documents re-

quired under the third item are designed to enable a determination both of whether a person with the required authority over the note is available and of whether the party seeking to foreclose is in fact ''[t]he beneficiary of the deed of trust or a representative.'' NRS 107.086(4); *see Leyva*, 127 Nev. at 476-77, 255 P.3d at 1279 (explaining that ''[t]he legislative intent behind requiring a party to produce the assignments of the deed of trust and mortgage note is to ensure that whoever is foreclosing actually owns the note and has authority to modify the loan,'' and that ''[a]bsent a proper assignment of a deed of trust,'' one ''lacks standing to pursue foreclosure proceedings'' (internal quotations omitted)). In other words, the party seeking to obtain an FMP certificate through the FMP must show that it is the proper entity, under the nonjudicial foreclosure statutes, to proceed against the property. *Id.*

As explained above, to have standing to foreclose, the current beneficiary of the deed of trust and the current holder of the promissory note must be the same.[7] Here, the note, the deed of trust, and each assignment were produced at the mediation. NRS 107.086(4). However, as Edelstein argues, ''[j]ust providing documents is not enough, as the documents need to demonstrate . . . authority, as proven through the authenticated documents, to foreclose on a home.'' Edelstein primarily argues that no documents were provided to demonstrate a clear chain of both the deed of trust and the note from New American Funding, the original lender, to BNY Mellon. Specifically, he asserts that because ''MERS was merely a nominee and failed to provide evidence of its authority on behalf of . . . New American Funding to assign an interest in the deed of trust, [BNY Mellon] could not legally become beneficiary and noteholder for the purpose of participating in the mediation.'' In other words, Edelstein argues, BNY Mellon lacked ''authority to foreclose'' because the note was ''split'' from the deed of trust. To determine whether BNY Mellon had standing to foreclose, we consider whether the use of MERS ir-

---

[7]Indeed, in placing the onus of complying with the FMP requirements on the ''beneficiary of the deed of trust,'' the Legislature considered the beneficiary of the deed of trust to be the same party as the note holder. For example, the Legislature expressed that it does ''not want anyone who has no beneficial interest in the process to be required to attend the mediation. This is for the holder of the note.'' Hearing on A.B. 149 Before the Joint Commerce and Labor Comm., 75th Leg. (Nev., February 11, 2009) (testimony of Assemblywoman Barbara Buckley). Moreover, the Legislature has characterized the requirement that ''the person who is foreclosing actually owns the note'' as ''an elemental legal step.'' *Id.* The program rules, at least as they existed at the time of Edelstein's mediation, likewise anticipated a single note and deed beneficiary, and they interchangeably used the term beneficiary of the deed of trust and lender. *See, e.g.*, former FMR 5(8)(a) (2010) (amended and renumbered as FMR 10(1)(a) (effective March 1, 2011)) (describing requirements for the ''Beneficiary (lender)'').

reparably ''splits'' the note and the deed of trust or otherwise impacts BNY Mellon's entitlement to enforce the note and the deed of trust.

The effect of MERS

''MERS is a private electronic database . . . that tracks the transfer of the 'beneficial interest' in home loans, as well as any changes in loan servicers.'' *Cervantes*, 656 F.3d at 1038; *see also Jackson v. Mortgage Electronic*, 770 N.W.2d 487, 490 (Minn. 2009). Before discussing MERS' impact on this case, we explain how MERS works, as described in various reported decisions.

MERS was created in response to state recording laws governing deed of trust assignments. Many lenders sell all or part of their beneficial interests in home loan notes; they also change servicers. *Cervantes*, 656 F.3d at 1038. Indeed, ''[i]t has become common for original lenders to bundle the beneficial interest in individual loans and sell them to investors as mortgage-backed securities, which may themselves be traded.'' *Id.* at 1039. Correspondingly, the beneficial interest in the security—the deeds of trust—would also be assigned. In most states, however, lenders are required to record any changes to the deed of trust beneficiary and trustee. *Id.* As the selling of loans increased, ''[t]his recording process became cumbersome to the mortgage industry,'' *id.*, often causing ''confusion, delays, and chain-of-title problems.'' *Jackson*, 770 N.W.2d at 490. Thus, ''MERS was designed to avoid the need to record multiple transfers of the deed.'' *Cervantes*, 656 F.3d at 1039.

Typically, when a loan is originated, ''MERS is designated in the deed of trust as a nominee for the lender and the lender's 'successors and assigns,' and as the deed's 'beneficiary' which holds legal title to the security interest conveyed.'' *Id.* MERS' role in subsequent note transfers depends on whether or not the note is transferred to another MERS member or a non-MERS member. ''If the lender sells or [transfers] the . . . [note] to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to [be the beneficiary of record] on the new lender's behalf.'' *Id.*; *see also In re Agard*, 444 B.R. 231, 248 (Bankr. E.D.N.Y. 2011) (''So long as the sale of the note involves a MERS Member, . . . [t]he seller of the note does not and need not assign the [deed of trust] because under the terms of that security instrument, MERS remains the holder of title to the [deed of trust], that is, the mortgagee, as the nominee for the purchaser of the note, who is then the lender's successor and/or assign.'' (internal quotations omitted)), *vacated in part by Agard v. Select Portfolio Servicing, Inc.*, Nos. 11-CV-1826(JS), 11-CV-2366(JS), 2012 WL 1043690 (E.D.N.Y. Mar. 28, 2012). ''According to MERS, this system 'saves lenders time and money, and

reduces paperwork, by eliminating the need to prepare and record assignments when trading loans.' '' *Jackson*, 770 N.W.2d at 490. However, ''[a] side effect . . . is that a transfer of an interest in a mortgage [note] between two MERS members is unknown to those outside the MERS system.'' *Id.* Conversely, ''[i]f the . . . [note] is sold to a non-MERS member, the [assignment] of the deed from MERS to the new lender is recorded in county records and the [note] is no longer tracked in the MERS system.'' *Cervantes*, 656 F.3d at 1039.

A representative from MERS testified before a bankruptcy court that its ''members often wait until a default or bankruptcy case is filed to have a mortgage or deed of trust assigned to them so that they can take steps necessary to seek stay relief and/or to foreclose.'' *In re Tucker*, 441 B.R. 638, 644 (Bankr. W.D. Mo. 2010). In general, ''[t]he reason they wait is that, if a note is paid off eventually, as most presumably are, MERS is authorized to release the [deed of trust] without going to the expense of ever recording any assignments.'' *Id.*

The use of MERS does not irreparably split the note and the deed of trust

Edelstein contends that MERS ''is merely a nominee or agent that cannot act without authorization by its principal,'' and that the use of MERS irreparably splits the note and the deed of trust, thereby divesting BNY Mellon of ability to foreclose or to modify the loan. He further argues that ''[a]ny actions by MERS with respect to the mortgage note or deed of trust would be ineffective.'' Because nothing in Nevada law prohibited MERS' actions, we reject Edelstein's argument and examine the two more common approaches taken by other jurisdictions to resolve the issue of whether splitting a promissory note and a deed of trust is irreparable or fatal to a beneficiary's entitlement to enforce the note and the deed of trust.[8]

---

[8]We recognize that there exist other approaches to this issue. Each state must individually determine whether this system designed to create a national electronic promissory note tracking system comports with state law concerning both promissory notes and title to real property. *See Bain v. Metropolitan Mortg. Group, Inc.*, 285 P.3d 34 (Wash. 2012) (holding that MERS is not a deed of trust beneficiary for failure to meet Washington's statutory requirement that a beneficiary of a deed of trust must hold the promissory note and rejecting the proposition that phrase nominee creates an agency relationship between MERS and note holders); *Niday v. GMAC Mortgage*, 284 P.3d 1157 (Or. Ct. App. 2012) (holding that the secured party note holder is always the beneficiary of the deed of trust and rejecting MERS' standing in nonjudicial foreclosure); *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d 40, 53-54 (Mass. 2011) (discussing MERS' standing in foreclosure proceedings).

The traditional rule

[Headnote 7]

Under the traditional rule, a court need follow only the ownership of the note, not the corresponding deed of trust, to determine who has standing to foreclose. Specifically, ''when a note secured by a mortgage is transferred, 'transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.' '' *In re Vargas*, 396 B.R. 511, 516 (Bankr. C.D. Cal. 2008) (quoting *Carpenter v. Longan*, 83 U.S. 271, 275 (1872)). '' 'The [deed] can have no separate existence.' '' *Id.* at 517 (quoting *Carpenter*, 83 U.S. at 275). Put another way, '' 'an assignment of the note carries the [deed] with it, while an assignment of the latter alone is a nullity.' While the note is 'essential,' the [deed] is only 'an incident' to the note.'' *Id.* (quoting *Carpenter*, 83 U.S. at 274). Thus, under the traditional rule, splitting the note and the deed of trust is impossible. The holder of the note always has both.

[Headnote 8]

Pursuant to the traditional rule, MERS' ''assignment of the deed of trust separate from the note'' would have no force. *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009) (explaining that ''MERS never held the promissory note, thus its assignment of the deed of trust . . . separate from the note had no force''). Adopting the traditional rule would be inconsistent with our holding in *Leyva v. National Default Servicing Corp.*, however, in which we explained that ''[t]ransfers of deeds of trust and mortgage notes are distinctly separate.'' 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011). Indeed, to foreclose, one must be able to enforce *both* the promissory note *and* the deed of trust. *Id.*; NRS 107.086(4). Under the traditional rule, entitlement to enforce the promissory note would be sufficient to foreclose; it would be superfluous to then require one to separately prove that a previous beneficiary ''properly assigned its interest in land via the deed of trust'' by requiring the new beneficiary ''to provide a signed writing . . . demonstrating that transfer of interest.'' *Leyva*, 127 Nev. at 477, 255 P.3d at 1279. Accordingly, we decline to adopt the traditional rule and instead consider the Restatement approach.

The Restatement approach

[Headnote 9]

Under the Restatement approach, a promissory note and a deed of trust are automatically transferred together unless the parties agree otherwise. Specifically, ''[a] transfer of an obligation secured

by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.'' Restatement (Third) of Prop.: Mortgages § 5.4(a) (1997). Similarly, ''[e]xcept as otherwise required by the Uniform Commercial Code, a transfer of a [deed of trust] also transfers the obligation the [deed of trust] secures unless the parties to the transfer agree otherwise.'' *Id.* § 5.4(b). Thus, unlike the traditional rule, a transfer of either the promissory note or the deed of trust generally transfers both documents. The Restatement also diverges from the traditional rule in that it permits the parties to separate a promissory note and a deed of trust, should the parties so agree.

The Restatement notes that ''[i]t is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the [deed of trust], but that result should follow only upon evidence that the parties to the transfer so agreed. The far more common intent is to keep the two rights combined.'' *Id.* § 5.4 cmt. a. This is because, as we have discussed, both the promissory note and the deed must be held together to foreclose; ''[t]he [general] practical effect of [severance] is to make it impossible to foreclose the mortgage.'' *Id.* § 5.4 cmt. c; *see also Cervantes*, 656 F.3d at 1039.

[Headnotes 10, 11]

In this case, New American Funding was the initial holder of the note, whereas MERS was characterized in the deed of trust as ''a separate corporation that is acting solely as a *nominee* for Lender and Lender's successors and assigns.'' (Emphasis added.) The deed of trust also stated that ''MERS is the *beneficiary* under this Security Instrument.'' (Emphasis added.) When interpreting a written agreement between parties, this court ''is not at liberty, either to disregard words used by the parties . . . or to insert words which the parties have not made use of. It cannot reject what the parties inserted, unless it is repugnant to some other part of the instrument.'' *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966) (internal quotations omitted). Thus, we examine the effect of designating MERS both as a nominee for New American Funding and its successors and assigns, and as a beneficiary of the deed of trust. Other courts have held that MERS' designation as nominee ''is more than sufficient to create an agency relationship between MERS and the Lender and its successors.'' *In re Tucker*, 441 B.R. at 645; *In re Martinez*, 444 B.R. 192, 205-06 (Bankr. D. Kan. 2011) (concluding that based on the language in the relevant documents giving MERS a role as ''nominee'' for ''[the lender] and its successors and assigns, . . . sufficient undisputed evidence [was presented] to establish that MERS was acting as an agent,'' and that the choice of the word '' 'nominee,' rather than 'agent,' does not alter the relationship between the[ ] . . . parties, especially given the fact that the two terms

have nearly identical legal definitions''); *Cervantes*, 656 F.3d at 1044 (explaining MERS' role as an agent).

We agree with the reasoning of these jurisdictions and conclude that, in this case, MERS holds an agency relationship with New American Funding and its successors and assigns with regard to the note. Pursuant to the express language of the deed of trust, ''MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender . . . .'' Accordingly, MERS, as an agent for New American Funding and its successors and assigns, had authority to transfer the note on behalf of New American Funding and its successors and assigns. *See generally Leyva*, 127 Nev. at 477-79, 255 P.3d at 1279-80 (discussing ''[t]he proper method of transferring . . . a mortgage note'').

[Headnote 12]

The deed of trust also expressly designated MERS as the beneficiary; a designation we must recognize for two reasons. First, it is an express part of the contract that we are not at liberty to disregard, and it is not repugnant to the remainder of the contract. *See Royal Indem. Co.*, 82 Nev. at 150, 413 P.2d at 502. In *Beyer v. Bank of America*, the United States District Court for the District of Oregon examined a deed of trust which, like the one at issue here, stated that ''MERS is the beneficiary under this Security Instrument.'' 800 F. Supp. 2d 1157, 1160-62 (D. Or. 2011). After examining the language of the trust deed and determining that the deed granted ''MERS the right to exercise all rights and interests of the lender,'' the court held that ''MERS [is] a proper beneficiary under the trust deed.'' *Id.* at 1161-62. Further, to the extent the homeowners argued that the lenders were the true beneficiaries, ''the text of the trust deed contradicts [their] position.'' *Id.* at 1161; *accord Reeves v. ReconTrust Co., N.A.*, 846 F. Supp. 2d 1149 (D. Or. 2012). Similarly here, the deed of trust's text, as plainly written, repeatedly designated MERS as the beneficiary, and we thus conclude that MERS is the proper beneficiary. Second, it is prudent to have the recorded beneficiary be the actual beneficiary and not just a shell for the ''true'' beneficiary. In Nevada, the purpose of recording a beneficial interest under a deed of trust is to provide ''constructive notice . . . to all persons.''[9] NRS 106.210. To permit an entity that is not really the beneficiary to record itself as the beneficiary would defeat the purpose of the recording statute and encourage a lack of transparency.

---

[9]As noted earlier, Nevada law changed in 2011 to now require that ''any assignment of the beneficial interest under a deed of trust *must* be recorded.'' NRS 106.210 (emphasis added); 2011 Nev. Stat., ch. 81, § 1, at 327.

However, whether designating MERS as the beneficiary on the deed of trust demonstrates an agreement to separate the promissory note from the deed of trust is an issue of first impression for this court.

Although we conclude that MERS is the proper beneficiary pursuant to the deed of trust, that designation does not make MERS the holder of the note. Designating MERS as the beneficiary does, as Edelstein suggests, effectively ''split'' the note and the deed of trust at inception because, as the parties agreed, an entity separate from the original note holder (New American Funding) is listed as the beneficiary (MERS). *See generally In re Agard*, 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011). And a beneficiary is entitled to a distinctly different set of rights than that of a note holder. *See Cervantes*, 656 F.3d at 1039 (explaining that a ''holder of [a] note is *only* entitled to repayment,'' whereas a ''holder of [a] deed alone does not have a right to repayment,'' but rather, has the right ''to use the property as a means of satisfying repayment'' (emphasis added)); *Leyva*, 127 Nev. at 476-77, 255 P.3d at 1279 (explaining that while a deed of trust ''is an instrument that 'secure[s] the performance of an obligation or the payment of any debt,' '' a mortgage note is a negotiable instrument that entitles the note holder to a payment of debt (alteration in original) (quoting NRS 107.020)).

However, this split at the inception of the loan is not irreparable or fatal. ''Separation of the note and security deed creates a question of what entity would have authority to foreclose, but does not render either instrument void.'' *Morgan v. Ocwen Loan Servicing, LLC*, 795 F. Supp. 2d 1370, 1375 (N.D. Ga. 2011). Rather, ''[a]ssuming *arguendo*, that there was a problem created by the physical separation of the Security Deed from the Note, that problem vanishe[s]'' when the same entity acquires both the security deed and the note. *In re Corley*, 447 B.R. 375, 384-85 (Bankr. S.D. Ga. 2011). Indeed, while entitlement to enforce both the deed of trust and the promissory note is required to foreclose, nothing requires those documents to be unified from the point of inception of the loan. *In re Tucker*, 441 B.R. 638, 644 (Bankr. W.D. Mo. 2010). Instead, ''[a] promissory note and a security deed are two separate, but interrelated, instruments,'' *Morgan*, 795 F. Supp. 2d at 1374, and their transfers are also ''distinctly separate,'' *Leyva*, 127 Nev. at 476, 255 P.3d at 1279.[10]

---

[10]The idea that various rights concerning real property may be severed and freely assigned without destroying such rights is not novel or unique. Indeed, real property is generally described as a bundle of rights. *See ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 173 P.3d 734 (2007). In other contexts of real property, it is commonly accepted that a right may be severed and later reunified. For example, the right to travel over a property may be carved out

[Headnote 13]

Because the Restatement approach is more consistent with reason and public policy and with our recent holding in *Leyva*, we adopt the approach of the Restatement (Third) of Property and hold that MERS is capable of being a valid beneficiary of a deed of trust, separate from its role as an agent (nominee) for the lender. We further conclude that such separation is not irreparable or fatal to either the promissory note or the deed of trust, but it does prevent enforcement of the deed of trust through foreclosure unless the two documents are ultimately held by the same party. *Cervantes*, 656 F.3d at 1039. MERS, as a valid beneficiary, may assign its beneficial interest in the deed of trust to the holder of the note, at which time the documents are reunified. Applying these holdings to the facts of this case, we now address whether BNY Mellon was entitled to enforce both the deed of trust and the note.

BNY Mellon is entitled to enforce the deed of trust and the note[11]

[Headnotes 14-16]

In his petition in the district court, Edelstein requested sanctions based on his arguments that BNY Mellon did not have authority to foreclose and that it participated in the mediation in bad faith. The district court also refused to impose sanctions and authorized issuance of the FMP certificate. This court reviews a district court's factual determinations deferentially, *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (explaining that a ''district

---

by the creation of an easement, but if that easement is later transferred to the title holder, the easement merges back into the fee. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846-47, 858 P.2d 1258, 1261 (1993). This general concept is consistent with our holding here.

[11]Edelstein argues that there was no ''written statement'' proving Bank of America's authority to attend the mediation. Neither party provides evidence that BNY Mellon authorized Bank of America to enforce the note. *See generally In re Veal*, 450 B.R. 897, 920 (B.A.P. 9th Cir. 2011); *see also* NRS 111.205(1) (requiring an agent negotiating an interest in real property to have written authority). However, BNY Mellon indicated at the hearing before the district court that Bank of America was BNY Mellon's servicer, and a servicer is a representative within the meaning of NRS 107.086(4). Additionally, in responding to Edelstein's petition for judicial review, counsel appearing on behalf of BNY Mellon described her law firm as ''[a]ttorneys for Bank of America, duly authorized servicer for The Bank of New York Mellon,'' and she alleged that she was informed by Bank of America's representative attending the mediation that ''he had full authority to negotiate the loan on behalf of [BNY Mellon].'' Further, Edelstein informed the district court that he was making his payments to Bank of America, and ''[t]he servicer of the loan collects payments from the borrower.'' *Cervantes*, 656 F.3d at 1039. We note that while a servicing agreement would have been helpful to discern the extent of Bank of America's authority in this mediation, production of such an agreement is not expressly required by statute or the program rules.

court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence''), and its legal determinations de novo. *Clark County v. Sun State Properties*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court. *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468, 255 P.3d 1281, 1287 (2011).

[Headnotes 17-20]

To prove that a previous beneficiary properly assigned its beneficial interest in the deed of trust, the new beneficiary can demonstrate the assignment by means of a signed writing. *Leyva*, 127 Nev. at 476, 255 P.3d at 1279. Here, BNY Mellon claims that it can enforce the deed of trust because MERS assigned its beneficial interest in the deed of trust to BNY Mellon. Certified copies of the deed of trust and the subsequent assignment were produced at the mediation; thus, BNY Mellon is entitled to enforce the deed of trust.[12] With respect to the note, MERS also assigned its beneficial interest in the deed of trust ''[t]ogether with the note or notes therein . . .'' to BNY Mellon. Because we hold that MERS, as agent (nominee) for New American Funding's successors and assigns, can transfer the note on behalf of the successors and assigns, we conclude that this action also transferred the note to BNY Mellon. *See id.* at 479, 255 P.3d at 1281 (explaining that, without showing a valid negotiation, a party can establish its right to enforce the note by demonstrating a proper transfer).

[Headnotes 21, 22]

Even independently of MERS' assignment, BNY Mellon was entitled to enforce the note. The Uniform Commercial Code, Article 3, governs transfers of negotiable instruments, like the note. *Leyva*, 127 Nev. at 477, 255 P.3d at 1279. Therefore, for a subsequent lender to establish that it is entitled to enforce a note, it must present ''evidence showing [e]ndorsement of the note either in its favor or in favor of [its servicer].'' *In re Veal*, 450 B.R. 897, 921 (B.A.P. 9th Cir. 2011); *see also Leyva*, 127 Nev. at 477, 255 P.3d at 1279.

[Headnotes 23-27]

When a note is endorsed to another party, Article 3 of the UCC permits a note to ''be made payable to bearer or payable to

---

[12]On appeal, Edelstein contends that the assignment of the deed of trust is invalid because the notary predates the date of the assignment. In this, and without citation to specific authority, Edelstein claims that the assignment was void. However, Edelstein did not raise this issue in the district court; thus, we need not address it on appeal. *See In re AMERCO Derivative Litigation*, 127 Nev. 196, 217-18 n.6, 252 P.3d 681, 697 n.6 (2011) (declining to consider an issue raised for the first time on appeal).

order,'' depending on the type of endorsement. *Leyva*, 127 Nev. at 478, 255 P.3d at 1280 (citing NRS 104.3109). Relevant here, ''[w]hen endorsed in blank, an instrument becomes payable to bearer . . . .'' NRS 104.3205(2). Further, ''a note initially made payable 'to order' can become a bearer instrument, if it is endorsed in blank.'' *Bank of New York v. Raftogianis*, 13 A.3d 435, 439 (N.J. Super. Ct. Ch. Div. 2010); *see also* U.C.C. § 3-205 cmt. 2 (2004) (explaining that if ''the holder of an instrument, intending to make a special [e]ndorsement, writes the words 'Pay to the order of' without . . . writing the name of the [e]ndorsee,'' the instrument becomes bearer paper). Here, New American Funding, the original lender, endorsed the note to Countrywide Bank, N.A., who then endorsed the note to Countrywide Home Loans, Inc.[13] Countrywide Home Loans endorsed the note, in blank, as follows: ''Pay to the order of _____ Without Recourse.'' Thus, the note was bearer paper.

[Headnote 28]

''If the note is payable to bearer, that 'indicates that the person in possession of the promise or order is entitled to payment.' '' *Leyva*, 127 Nev. at 478, 255 P.3d at 1280 (quoting NRS 104.3109(1)(a)); *see also* NRS 104.3205(2) (explaining that an instrument endorsed in blank is payable to bearer and ''may be negotiated by transfer of possession alone''); NRS 104.3201(2) (''If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.''). This means that to be entitled to enforce the note, BNY Mellon would merely have to possess the note. *Cf. Leyva*, 127 Nev. at 478-79, 255 P.3d at 1280 (discussing the process to be entitled to enforce order paper).

At the time of the mediation, ReconTrust, BNY Mellon's trustee, physically possessed the note. Edelstein argues that because ReconTrust ''was in possession, not [BNY Mellon],'' ReconTrust was arguably ''the holder and person entitled to enforce bearer paper.'' However, Edelstein did not raise this issue in the district court. *See In re AMERCO Derivative Litigation*, 127 Nev. 196, 217-18 n.6, 252 P.3d 681, 697 n.6 (2011) (declining to consider an issue raised for the first time on appeal). Accordingly, we conclude that because ReconTrust as trustee possessed the note, BNY Mellon, the beneficiary, was entitled to enforce it. *See generally Monterey S.P. Part. v. W.L. Bangham*, 777 P.2d 623, 627

---

[13]Edelstein argues in his reply brief that because the document merely says ''Patty Arvielo and the term 'V.P.,' '' not V.P. of New American Funding, it was an ''anomalous endorsement and would not be sufficient to negotiate the note to Countrywide Home Loans, Inc.'' However, he does not make this argument in his opening brief; thus, we do not consider it. *See generally Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (stating that this court need not consider issues raised for the first time in an appellant's reply brief).

(Cal. 1989) (explaining that ''[b]ecause a deed of trust typically secures a debt owed the beneficiary, it is the beneficiary, not the trustee, whose economic interests are threatened when the existence or priority of the deed of trust is challenged,'' and noting that the beneficiary is the real party in interest); *accord In re Veal*, 450 B.R. at 917 (holding that Wells Fargo could not establish holder status because ''it did not show that it or its agent had actual possession''); *cf.* NRS 104.9313 and UCC § 9-313, cmt. 3 ''Possession'' (explaining that principles of agency apply in determining actual possession in the UCC, and that where an agent of a secured party has physical possession of a note, the secured party has taken actual possession).

[Headnote 29]

Because BNY Mellon was entitled to enforce both the note and the deed of trust, which were reunified,[14] we conclude that BNY Mellon demonstrated authority over the note and to foreclose, and thus, there was no abuse of discretion or legal error on the part of the district court.[15]

Accordingly, we affirm the judgment of the district court.

CHERRY, C.J., and DOUGLAS, SAITTA, GIBBONS, PICKERING, and PARRAGUIRRE, JJ., concur.

---

[14]Because it is not at issue in this case, we need not address what occurs when the promissory note and the deed of trust remain split at the time of the foreclosure. *See, e.g.*, *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d 40, 53-54 (Mass. 2011) (discussing what occurs in instances ''where a note has been [transferred] but there is no written assignment of the [deed] underlying the note'').

[15]Edelstein argues that BNY Mellon failed to act in good faith because it lacked authority and failed to produce adequate documents to establish its authority. Based on our holdings in this opinion, we reject his argument.